(25,436)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 606.

H. SNOWDEN MARSHALL, APPELLANT,

vs.

ROBERT B. GORDON, SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 *Petition for Writ of Habeas Corpus.*

In the District Court of the United States for the Southern District of New York.

In the Matter of H. SNOWDEN MARSHALL, Petitioner.

To the Judges of the District Court of the Southern District of New York:

The petition of H. Snowden Marshall respectfully shows:

First. Petitioner is a citizen of the United States and of the State of New York and is a resident of the city of New York. He is now and since May, 1913, has been attorney of the United States in and for the Southern District of New York.

Second. Petitioner is now imprisoned and restrained of his liberty in the Southern District of New York by one Robert B. Gordon, sergeant-at-arms of the House of Representatives of the United States, unlawfully and without due process of law, and in violation of petitioner's rights under the Constitution.

Third. Petitioner is held by said Robert B. Gordon under color and claim of authority of the House of Representatives of the United States, by virtue of an order or warrant signed by the Speaker of the House of Representatives of the United States, directing the said Gordon as sergeant-at-arms to take petitioner in custody and bring him to the Bar of said House to answer the charge that petitioner on March 4, 1916, in the city of New York did write and pub-

2 lish a certain letter and did thereby violate the privileges of the House of Representatives and commit a contempt of the House of Representatives. Said warrant was issued pursuant to a resolution of the House of Representatives adopted on the 20th day of June, 1915. Petitioner is restrained of his liberty only under and by virtue of said warrant, and not by virtue of any judgment or order of any court of justice.

Fourth. Petitioner avers that the writing and publishing of said letter as charged in said resolution is not and was not a contempt of the House of Representatives nor a breach of its privileges; that the House of Representatives is without Jurisdiction to try or punish petitioner for his said act, and is without lawful power or right to arrest petitioner to answer a charge of contempt based thereon; and that the arrest and detention of petitioner under said warrant is without due process of law and in violation of petitioner's constitutional rights.

Fifth. The act of the petitioner in writing and publishing the letter complained of, and the attempt of the House of Representatives to try petitioner for contempt, occurred under the following circumstances:

(1) On December 28, 1915, the United States Grand Jury in the Southern District of New York returned into the United States

District Court for that district an indictment charging one Frank Buchanan, who was then a member of the House of Representatives of the United States, together with other persons, with violating the act of Congress of July 2, 1890, commonly called the Sherman Anti-trust Law;

3 (2) On January 12, 1916, and after the return of said indictment, said Frank Buchanan arose on the floor of the House of Representatives of which he was still a member and charged petitioner with the commission of some forty offenses, and presented to the House a resolution (No. 90) directing the Committee on the Judiciary to inquire and report whether action of the House was necessary upon said charges; on the same day said resolution was referred by the House of Representatives to the Committee on the Judiciary. The statement of said Buchanan on the floor of the House, and a copy of said resolution No. 90 appear on pages 7 and 11 of House report No. 544, to which said House report reference is hereby made as if the same were herein set forth at length;

(3) On January 27, 1916, the House of Representatives adopted resolution No. 110 authorizing the Committee on the Judiciary in considering resolution No. 90 to take testimony and to appoint a sub-committee with the same powers, copy of which resolution No. 110 appears on page 12 of said House report No. 544;

(4) On February 1, 1916, the Commitee on the Judiciary appointed Messrs. Charles C. Carlin, Warren Gard and John M. Nelson as a sub-committee as authorized by resolution No. 110;

(5) Said sub-committee proceeded to hear witnesses in the District of Columbia, and those witnesses were heard in executive sessions; on February 28, 1916, and thereafter said sub-committee heard witnesses in the city of New York, and those witnesses were heard publicly and in the presence of representatives of the newspapers. The testimony taken by said sub-committee in the city of New York between February 28 and March 4, 1916 has been printed as a public document, and to said document reference is hereby made as if same were herein set forth at length.

4 (6) On March 3, 1916 the New York Times published an article in which the following statement was made:

"It is the belief in the District Attorney's office that the real aim of the Congress investigation is to put a stop to the criminal investigation of the pro-German partisans."

On the same day, and in excess of any jurisdiction possessed by it, the said sub-committee called before it one Leonard R. Holme, a reporter of the New York Times, who admitted that he had written said article, but refused to answer the question whether he had conferred with petitioner before writing it. Thereupon said sub-committee unlawfully and in excess of its power directed the sergeant-at-arms of the House to arrest and detain the witness and keep him in custody until further order. On the same day, said sergeant-at-arms by direction of said sub-committee sought to turn over the said Holme to the United States Marshal for the Southern District of New York for safe keeping, but said Marshal refused to receive him

on the ground that there was no authority for his arrest. Later in the same day said Holme was again brought before said sub-committee and refused to answer another question as to whether the belief stated in his article had been expressed to him by petitioner or any of petitioner's assistants; and said committee thereupon determined said Holme to be in contempt of the committee and of the House of Represenattives, but released said Holme from custody pending its further proceeding;

(7) When petitioner learned of the action of said sub-committee in this respect, which in his judgment was wholly beyond the powers of said sub-committee, he wrote the letter of March 4, 1916, and after the same had been delivered to the said Chairman, petitioner released copies thereof to the newspapers in the city of New York.

5 (8) On April, 1916, the Committee on the Judiciary of the House of Representatives made a report to the House (No. 494) copy of which report appears on pages 21 to 25 of said House Report No. 544;

(9) On the same day the House of Representatives adopted resolution No. 193 appearing on page 1 of House Report No. 544, and on the same day the House appointed a select committee of five members to consider said report No. 494, and to report to the House of Representatives the facts in the case and what action, if any, should be taken against petitioner;

(10) On April 14, 1916 said select committee made a report to the House of Representatives of its action and findings and recommendations in the matter. Said report is No. 544;

(11) On June 20, 1916 the House of Representatives adopted a resolution finding petitioner to be guilty of a breach of the privileges and of a contempt of the House of Representatives, and directing the Speaker to issue his warrant to the sergeant-at-arms, directing the latter to arrest petitioner and bring him forthwith to the Bar of the House of Representatives;

On or about June 21, 1916 the warrant of the House of Representatives for petitioner's arrest was signed and delivered to Robert B. Gordon, its sergeant-at-arms said Robert Gordon;

On June 26", 1916, said Sergeant-at-arms Robert Gordon acting under said warrant arrested and detained and now restrains this petitioner of his liberty;

Sixth. That the letter of March 4, 1916 was written and published by the petitioner in the city of New York and not in the District of Columbia; that the House of Representatives is without lawful

6 authority to punish as a contempt or as a breach of its privileges any comment made outside of the House of Representatives and outside the District of Columbia criticising the conduct of the said House of Representatives or of any committee or sub-committee thereof or of any of its members whether acting individually or as a sub-committee; that the House of Representatives is without lawful authority to punish this petitioner for his said act in writing and publishing said letter in the city of New York; that the arrest and de-

tention of the petitioner is without due process of law and in violation of his constitutional rights.

And your petitioner will ever pray, etc.

H. SNOWDEN MARSHALL,
Petitioner.

Dated, New York, N. Y., June 26", 1916.

UNITED STATES OF AMERICA,
Southern District of New York,
State of New York, County of New York, ss:

H. Snowden Marshall, being duly sworn, deposes and says, that he is the person whose name is subscribed to the foregoing petition for writ of habeas corpus; that he is familiar with the contents of said petition, and that the matters and things therein contained are true to the best of his knowledge, information and belief.

H. SNOWDEN MARSHALL.

Subscribed and sworn to before me this 26" day of June, 1916.

[SEAL.] S. H. RICHARDS,
Notary Public, #66, County of New York,
State of New York.

(Filed June 26, 1916.)

7 *Writ of Habeas Corpus.*

The President of the United States to Robert B. Gordon, Esq., Sergeant-at-arms of the House of Representatives of the United States:

We command you that you have the body of H. Snowden Marshall, United States Attorney for the Southern District of New York, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name he shall be called or charged, before the District Court of the United States in and for the Southern District of New York, of the 26" day of June, 1916, forthwith, to do and receive what shall then and there be considered concerning the said H. Snowden Marshall, and have you then and there this writ.

Witness, the Honorable Charles M. Hough, Judge of the United States District Court, Southern District of New York, 26" day of June, 1916.

District Court of the United States for the Southern District of New York.

The foregoing writ is hereby allowed.

The petitioner may be discharged on his own recognizance, pending the proceedings thereon.

[SEAL.] AUGUSTUS N. HAND,
United States District Judge.

(Filed June 26, 1916.)

8 *Amended Return.*

Filed July 19, 1916.

United States District Court, Southern District of New York.

In the Matter of H. SNOWDEN MARSHALL, Petitioner.

To the Honorable the District Court of the United States for the Southern District of New York:

I, Robert B. Gordon, the Sergeant-at-arms of the House of Representatives of the United States, do hereby certify and make the following amended return to the writ of habeas corpus granted herein on the 26th day of June, 1916:—

First. That on the 26th day of June, 1916, I arrested H. Snowden Marshall, and took him into my custody, and held him under and pursuant to a warrant duly issued by and in virtue of the authority granted by the House of Representatives of the United States, which warrant is in the words and figures following, to wit:

9 *"Warrant.*

"House of Representatives, United States of America.

"June 22, 1916.

"To Robert B. Gordon, Sergeant-at-Arms, Greeting:

"The following resolution was, on June 20, 1916, adopted by the House of Representatives, to wit:

"Resolved, That the Speaker do issue his warrant, directed to the Sergeant-at-Arms, commanding him to take in custody, wherever to be found, the body of H. Snowden Marshall, of the State of New York, and to proceed forthwith to bring the said H. Snowden Marshall to the bar of the House of Representatives, to answer the charge that he, on March fourth, nineteen hundred and sixteen, in the City of New York, did violate the privileges of the House of Representatives of the United States by writing and causing to be published the following letter:

"Department of Justice, United States Attorney's Office.

"NEW YORK, March 4, 1916.

"SIR: Yesterday afternoon, as I am informed, your honorable committee ordered the arrest of Mr. L. R. Holme, a representative of a newspaper which had published an article at which you took offense. The unfortunate gentleman of the press was placed
10 in custody under your *or* orders. He was taken to the United States Marshal to be placed in confinement (I do not understand whether his sentence was to be one day or a dozen years).

The marshal very properly declined to receive the prisoner. This left you at a loss, and I am advised that you tried to work your way out of the awkward situation by having Mr. Holme brought back and telling him that you were disposed to be 'kind' to him and then discharged him for the purpose of avoiding unpleasant consequences to yourselves.

"You are exploiting charges against me of oppressive conduct toward a member of your honorable body who is charged with a violation of law and of oppressive conduct on my part toward shysters in the blackmailing and bankruptcy business.

"I may be able to lighten your labors by offering to resign if you can indicate anything I ever did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.

"The supposed justification of your order that Mr. Holme be placed in custody was his refusal to answer the question you asked as to where he got the information on which was based the article which displeased you.

"It is not necessary for you to place anyone under arrest in order to get the answers to the question which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which he published and from which he made deductions, so that if your honorable committee has a grievance, it is against me and not against him.

"What I told him was about as follows:

"I said that your expedition to this town was not an investigation conducted in good faith, but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

"I said that your whole proceeding here was irregular and extraordinary; that I had never heard of such conduct of an impeachment proceeding; that charges of this sort were not usually heard in public until the House of Representatives had considered them and were willing to stand back of them.

"I pointed out to him that you, contrary to the usual practice, had come here and had held public hearings; that among your witnesses you had invited every rogue that you could lay your hands on to come before you and blackguard and slander me and my assistants under the full privilege of testifying before a congressional committee.

"I told him that you had called one of my junior assistants before you and had attempted to make it publicly appear that his refusal to answer your questions as to what occurred in the grand jury room in the Buchanan case was due solely to my orders. I said that at the time you attempted to convey this public impression you knew that it was misleading because I had been asked by you to produce the minutes of the grand jury and had been instructed by the attorney general not to comply with your request, as you well knew. I showed him the telegram of the attorney general to me and showed him a copy of my letter to you, dated February twenty-ninth, nineteen hundred and sixteen, in which I sent

you a copy of the telegram of the attorney general instructing me not to give you the grand jury minutes.

"I told him that you were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh, and David Slade, in constant conference with you. I said that I believed that every word of the evidence, whether in so-called secret sessions or not, had been placed at the disposal of these worthies, and that I would be just as willing to give the grand jury minutes to a defendant as to give them to your honorable subcommittee.

"I told him that I did not share the views which seemed to prevail in your subcommittee on this subject. I said that I regarded a Member of Congress who would take money for an unlawful purpose from any foreign agent as a traitor, and that it was a great pity that such a person could only be indicted under the Sherman Law, which carried only one year in jail as punishment.

"I said that it was incomprehensible to me how your hon-
13 orable subcommittee should rush to the assistance of an indicted defendant; how you had apparently resolved to prevent prosecution by causing the district attorney in charge to be publicly slandered.

"I told him that I would not permit the prosecution of the persons whose cause you had apparently espoused to be impeded by you; I said that if you wanted the minutes of the grand jury in any case, you would not get them as long as I remained in office.

"You will observe from the foregoing statement that what Mr. Holme published may have been based on what I said. If you have any quarrel, it is with me, and not with him.

"It is amazing to me to think that you supposed that I did not understand what you have been attempting to do during your visit here. I realized that your effort was to ruin me and my office by publishing with your full approval the complaints of various persons who have run afoul of the criminal law under my administration. Your subcommittee has endeavored by insulting questions to my assistants and others, by giving publicity and countenance to the charges of rascals and by refusing to listen to the truth and refusing to examine public records to which your attention was directed, to publicly disgrace me and my office.

"I propose to make this letter public.

"Respectfully,

14 (Sd.) H. SNOWDEN MARSHALL,
"United States Attorney.

"Hon. C. C. Carlin, Chairman Subcommittee of the Judiciary Committee of the House of Representatives, 323 Federal Building, New York, N. Y.

"That the said H. Snowden Marshall, in writing and publishing said letter, was guilty of a breach of the privileges and a contempt of the House of Representatives, and that the said H. Snowden Marshall shall be furnished with a copy of this resolution, and a copy of the report of the select committee of the House of Representatives,

appointed to investigate the charges made against him in the House of Representatives.

"Resolved further, That when H. Snowden Marshall shall be brought to the bar of the House to answer the charge of having violated the privileges of the House of Representatives, as afore set out, the Speaker shall then cause to be read to said H. Snowden Marshall the findings of fact and findings of law by the special committee of the House, charged with the duty of investigating whether or not the said H. Snowden Marshall had violated the privileges of the House of Representatives, or was in contempt of the same; the Speaker shall then inquire of said H. Snowden Marshall if he desires to be heard, and to have counsel on the charge of being in contempt of the House of Representatives for having violated its privileges. If the said H. Snowden Marshall desires to avail himself of either of these privileges, the same shall be granted him. If not, the House shall thereupon proceed to take order in the matter.

"Attest:

"SOUTH TRIMBLE, *Clerk.*

"Now, therefore, this is to require you, Robert Gordon, Sergeant-at-Arms of the House of Representatives of the United States, forthwith to take into your custody the body of the said H. Snowden Marshall, of the State of New York, and to bring him before the bar of the House of Representatives of the United States to answer the charge of having violated the privileges of the House of Representatives as set out in the aforesaid resolution, and all marshals and deputy marshals, civil officers of the United States, and every other person are hereby requird to aid and assist you, for which this shall be your sufficient warrant.

"You are hereby required to furnish, and leave with the said H. Snowden Marshall a copy of said resolution of the House of Representatives adopted June 20, 1916, and also a copy of House Report No. 544 of the select committee of the House of Representatives appointed to investigate the charges made against him in the House of Representatives and filed in said House of Representatives on the 14th day of April, 1916.

"Hereof fail not, and make return in what manner you execute this writ.

(Sd.) "CHAMP CLARK,
"Speaker of the House of Representatives.

"In testimony of the authority of this warrant witness the seal of the House of Representatives of the United States this 22nd day of June, 1916.

"Attest:

[SEAL.] (Sd.) "SOUTH TRIMBLE,
"Clerk of the House of Representatives."

Second. That at the time of said arrest, I furnished to and left with said H. Snowden Marshall, a copy of the resolution of the House

of Representatives of June 20, 1916, and a copy of House Report No. 554, mentioned and referred to in the aforesaid warrant.

Third. That I was at all the times in this amended return mentioned, and I am now, the Sergeant-at-Arms of the House of Representatives of the United States, and as such authorized and
17 required by law and by the standing rules and the orders of the House of Representatives, to execute the commands of said House from time to time, together with all such process issued by authority thereof as should be directed to me by its Speaker; and that at all such times the Honorable Champ Clark was and is the Speaker of the said House, and by virtue of his office is authorized and required to subscribe and attest all writs, warrants and subpoenas issued by order of the House; and South Trimble was and is the Clerk of the said House, and as such authorized to subscribe and attest all writs, warrants and subpoenas issued by order of the House. That the House of Representatives, Sixty-fourth Congress, was duly organized the first Monday of December, 1915, and ever since has been in its first session of said Congress.

Fourth. That the warrant hereinbefore set forth, signed by the Speaker of the House and attested by the Clerk, was issued pursuant and in obedience to, and in virtue of, the resolution of the House which is recited in the aforesaid warrant, which said resolution was by the House of Representatives of the United States duly adopted and passed on the 20th day of June, 1916.

Fifth. And I further certify and set forth by way of amended return, that on the 14th day of December, 1915, while the House of Representatives was in session, Honorable Frank Buchanan, a
18 Representative in Congress and a member of said House, rose on the floor of the House, and impeached said H. Snowden Marshall, who was, and is, the United States Attorney for the Southern District of New York, charging him with the commission of certain alleged high crimes and misdemeanors; and the said matter was referred by the House to the Committee on the Judiciary.

Fifth *b*. That on the 28th day of December, 1915, the Grand Jury in the United States District Court for the Southern District of New York, returned an indictment against said Frank Buchanan and others, charging them with conspiracy to violate the provisions of the Sherman Anti-Trust Law.

Sixth. That on the 12th day of January, 1916, in the House of Representatives of the United States, there was submitted for the action of said House a certain resolution, to wit, House Resolution 90, which said House Resolution 90 is in the words and figures following, to wit:

19 64th Congress, 1st Session.

H. Res. 90.

In the House of Representatives.

January 12, 1916.

Mr. Buchanan of Illinois submitted the following resolution; which was referred to the Committee on the Judiciary and ordered to be printed.

Resolution.

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of H. Snowden Marshall; whether he has conspired with persons, firms, and corporations, their agents and servants, to grant such persons, firms, and corporations the privilege of violating various criminal, neutrality, interstate commerce, or customs laws of the United States in the southern district of New York; whether he has secured for persons or corporations great financial profit in consequence of the violation of the United States laws; whether he has corruptly and collusively participated in such conspiracies; whether he has corruptly
20 neglected and refused to prosecute gross and notorious violations of various criminal, neutrality, customs revenue, and antitrust laws of the United States within said judicial district; whether he has corruptly induced and procured grand juries to return into the District Court for the Southern District of New York indictments charging crimes without there being evidence before said grand jury which would in any degree justify the finding and filing of such indictments; whether he has been guilty of oppression in corruptly procuring indictments from the grand jury in said district charging reputable citizens with crime, although there was no evidence before the grand jury which would in the least warrant such charges; whether he has corruptly conspired with other persons to spread broadcast throughout the United States maliciously false newspaper publications and reports emanating as official statements and purporting to describe results of investigations conducted by said United States attorney and his assistants, with the object of destroying friendly relations between the United States and one or more foreign Governments; whether he has unlawfully and feloniously abused the legal process before the grand jury in said district of New York, the secret service, and the Bureau of Investigation and Inquiry of the Department of Justice in furtherance of such conspiracy aforesaid; whether he has knowledge or whether there are in existence circumstances, from which knowledge
21 is imputed to him, that large sums of money have been expended for or on behalf of foreign Governments and of vari-

ous purveyors and manufacturers of war munitions for the purpose of influencing the actions of said United States attorney in furtherance of a conspiracy; whether he has corruptly neglected and refused to prosecute men who have made the port of New York within said judicial district a military and naval base for foreign belligerent powers; whether he has corruptly neglected and refused to prosecute violations of the Federal statutes prohibiting the loading and shipment of explosives on ships carrying passengers within said judicial district; whether he has corruptly neglected and refused to prosecute violations of the foreign enlistment Act and laws of the United States; whether he has corruptly used the powers of his office for the purpose of slandering and libeling peaceable and law-abiding people to their great injury; whether he has abetted, approved, acquiesced in, and permitted unlawful and oppressive misuse of subpœnas and other process before the grand juries in said southern district of New York; whether he has deprived law-abiding citizens of their legal rights, privileges, and immunities; whether he has aided, abetted, and approved unlawful expenditures of public moneys in violation of the laws of the United States; whether he has been guilty of attempts by private solicitation to influence the official actions and opinions of judges in the
22 southern district of New York while in the performance of their judicial duties; whether he has used the powers of his office to cause and procure a discrimination in the assignment of judges to conduct trials in said district so as to discriminate against one or more resident judges; whether he has used the powers of his officer to procure or assist in the procurement of judges to be imported into the southern district of New York from other districts for the trial of cases in said district by falsely representing the condition of judicial business within said district; whether he has been guilty of private solicitation with intent to influence the official acts and decisions of judges imported as aforesaid; whether he has corruptly attempted to control decisions and official actions of one or more of such imported judges; whether he has procured the assignment of one or more imported judges for the conduct of trials in the said district for the purpose of preventing defendants in such cases from receiving a fair and impartial trial at the hands of resident judges; whether he has been a party to a conspiracy participated in by his assistant district attorneys and other officials connected with the administration of justice in the said southern district of New York for the purpose of unlawfully manipulating and controlling the selection of grand and petit jurors in connection with cases in the courts of said district; whether he has been
23 guilty of acts by which the rights of the United States and that of individuals have been unlawfully prejudiced, and the orderly and fair administration of justice defeated or obstructed in one or more instances; whether he has employed the powers of his office for the purpose of shielding and to prevent the exposure of unlawful and improper conduct of one James W. Osborne in relation to facts involved in civil litigation which was pending in the State court in the State of New York; whether he unlawfully pro-

tected the said Osborne and others from prosecution for the violation of United States laws; whether he has willfully and corruptly refused and neglected to prosecute gross and notorious violations of the United States statutes committed by said James W. Osborne and others in the city and State of New York within said district; whether he has prostituted the office of the United States district attorney for the southern district of New York; whether he has used the powers of his said office as United States district attorney to corruptly and willfully defame, slander, and injure the good name and professional standing of law-abiding citizens of the United States to their great injury for the purpose of protecting the private individual interests of James W. Osborne; whether he has corruptly failed, neglected, and refused to prosecute persons who, while acting as witnesses for the United States in the trial of causes, committed the crime of perjury, subornation of perjury, and conspiracy in
24 connection with the cases of the United States against Rae Tanzer, United States against Frank D. Safford, and United States against Albert J. McCullough, and others; whether he used and employed the United States grand jury in the southern district of New York for the purpose of attempting to establish records which might be used in defense of James W. Osborne, H. Snowden Marshall, Roger B. Wood, and Samuel H. Hershenstein, the last two being assistant United States district attorneys under said H. Snowden Marshall, and not for the purpose of investigation of violations of the United States laws; whether he has corruptly and willfully failed to remove certain of his assistant district attorneys who destroyed documentary evidence material in the trial of a pending case in the United States District Court for the Southern District of New York; whether he corruptly and maliciously caused to be instituted criminal proceedings against Rae Tanzer and others for the purpose of protecting James W. Osborne, a special United States district attorney and a personal intimate friend of said H. Snowden Marshall; whether he has corruptly and willfully failed and refused to present to the court in the trial of cases material and important evidence and in concealing or assisting and acquiescing in the concealment or destruction of material and important evidence relating to pending cases in the United States District Court for the Southern District of New York; whether he is corrupt, grossly
25 negligent, and unfit to retain the office as United States district attorney for the southern district of New York; whether he was willfully persistently violated the laws of the United States in connection with the performance by him of the duties of such United States district attorney for said southern district of New York; whether he has corruptly and willfully withheld and failed to present before the grand jury material and important evidence in connection with alleged investigations instituted before said grand jury by said H. Snowden Marshall in relation to the cases of the United States against Rae Tanzer and the United States against Albert J. McCullough and others; whether he has corruptly and willfully refused and neglected to take cognizance of unlawful conduct of his assistant district attorneys in connection with the per-

formance by them of official duties as such assistant district attorneys; whether he has corruptly participated in or acquiesced to the presentation to the court in trial of cases in the southern district of New York of alleged evidence which he knew to be untrue and manufactured, or in the manufacture of and attempt to manufacture such alleged evidence; whether he has produced willful injury and wrong to litigants in said district court and to citizens of the United States by his unlawful and improper conduct; whether
26 he has been guilty of any misbehavior for which he should be impeached.

And in making this investigation the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony on all of the charges which, in the opinion of the committee, constitute impeachable charges, employ a clerk and stenographer, and is also authorized to appoint a subcommittee to act for and on behalf of the whole committee whenever and wherever it may be deemed advisable to take testimony for the use of said committee. The said subcommittee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee or subcommittee, and shall attend the sitting of the same as ordered and directed thereby. The Speaker shall have authority to sign and the Clerk to attest subpœnas for any witness or witnesses.

27 [Endorsed:] 64th Congress, 1st Session. H. Res. 90. Resolution. Directing the Committee on the Judiciary to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of H. Snowden Marshall. By Mr. Buchanan of Illinois. January 12, 1916.—Referred to the Committee on the Judiciary and ordered to be printed.

28 Seventh. That the aforesaid House Resolution 90 was duly referred to the Committee on the Judiciary of the House of Representatives, and that thereafter the said Committee on the Judiciary began the consideration of said resolution, and proceeded to act thereon; and that thereafter, to wit, on the 27th day of January, 1916, by direction of the Committee on Judiciary of the House of Representatives, the Chairman of said Committee offered in the House of Representatives for its consideration a certain resolution, to wit, House Resolution 110, which said House Resolution 110 is in the words and figures following, to wit:

29 64th Congress,
1st Session.

H. Res. 110.

In the House of Representatives.

January 27, 1916.

Mr. Webb submitted the following resolution; which was agreed to.

Resolution.

Resolved, That the Committee on the Judiciary in continuing their consideration of House resolution ninety be authorized and empowered to send for persons and papers, to subpœna witnesses, to administer oaths to such witnesses, and take their testimony.

The said committee is also authorized to appoint a subcommittee to act for and on behalf of the whole committee wherever it may be deemed advisable to take testimony for said committee. In case such subcommittee is appointed it shall have the same powers in respect to obtaining testimony as are herein given to the Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall attend the sittings of such subcommittee and serve the process of same.

30 In case the Committee on the Judiciary or a subcommittee thereof deems it necessary it may employ such clerks and stenographers as are required to carry out the authority given in this resolution, and the expenses so incurred shall be paid out of the contingent fund of the House.

The Speaker of the House of Representatives shall have authority to sign, and the Clerk thereof to attest, subpœna for witnesses, and the Sergeant at Arms or a deputy shall serve them.

31 [Endorsed:] 64th Congress, 1st Session. H. Res. 110. Resolution Authorizing the Committee on the Judiciary to send for persons and papers, to subpœna witnesses, to administer oaths to such witnesses, and take their testimony. By Mr. Webb. January 27, 1916.—Agreed to.

32 Eighth. That the aforesaid House Resolution No. 110 was by the House of Representatives unanimously agreed to and adopted.

Ninth. That thereafter the Committee on the Judiciary of the House of Representatives proceeded further to consider the aforesaid

House Resolution 90 and the said House Resolution 110; and thereupon, on the 31st day of January, 1916, the said Committee on the Judiciary, at a regular session of said committee, made an order and direction that the Chairman of the said Committee on the Judiciary appoint a subcommittee of three to execute the purposes of House Resolution No. 110, and that the said subcommittee use its discretion as to the scope of its inquiry, covering the charges under examination, and the place or places of discharging its duties, and report the result of its investigation, with all evidence taken by it to the full committee; and that thereafter, to wit, on the 1st day of February, 1916, in Pursuance of the aforesaid order and direction of the committee, there were appointed by the said committee the Honorable Charles C. Carlin, Warren Gard and *and* John M. Nelson, who were then members of the said Committee on the Judiciary, as the subcommittee to further investigate for the committee the charges against H. Snowden Marshall, District Attorney for the Southern District of New York.

33 Tenth. That after the appointment of the said subcommittee, the said subcommittee duly organized and proceeded to hear the testimony of certain witnesses; and the said subcommittee, while considering the matters and things thus duly assigned by the aforesaid resolution, determined for its further information and in carrying out the duties assigned to it, that it should hear the testimony of certain other witnesses in the City of New York; and thereupon the said subcommittee proceeded to the City of New York, and caused certain witnesses under subpœna to be brought before it in the Federal Post Office Building in the City of New York, and continued the examination of witnesses, upon the said charges, up to and including the 4th day of March, 1916. That amongst other witnesses examined was Leonard R. Holme as stated in Report No. 494 hereinafter set forth. That on the said 4th day of March 1916 the said H. Snowdon Marshall, District Attorney for the Southern District of New York, wrote, published and caused to be transmitted to the Chairman of the said subcommittee of the House of Representatives of the United States, then in the performance of its duties as aforesaid, the certain letter, dated March 4, 1916, which is set forth and recited in the aforesaid warrant issued to the Sergeant-at-Arms of the House of Representatives, as hereinbefore stated; and that at the same time, or before the said letter was addressed to the Chairman of the subcommittee of the Judiciary Committee, was sent to the subcommittee, it was given by or through the direction of
34 the said H. Snowden Marshall to the daily newspapers, and published by them. That the said newspapers had a large and wide circulation throughout the City of New York, in the District of Columbia and in other parts of the United States.

Eleventh. That the fact that the aforesaid letter of H. Snowden Marshall was sent to the said subcommittee or its Chairman, and was

published, was duly communicated to the Committee on the Judiciar
of the House of Representatives; and that thereafter the said Com
mittee on the Judiciary reported the matter of the writing, sendin
and publication of said letter, to the House of Representatives, an
the report so made is Report No. 494 of the First Session of th
Sixty-fourth Congress, and is as follows, to wit:

64TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. } REPORT No. 494.

ALLEGED OFFICIAL MISCONDUCT OF H. SNOWDEN MARSHALL.

APRIL 5, 1916.—Ordered to be printed.

Mr. WEBB, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. Res. 193.]

By direction of the Committee on the Judiciary, I beg leave to make the following report, in the nature of a statement, to the House of Representatives. On the 12th day of January, 1916, Hon. Frank Buchanan, a Representative in Congress from the State of Illinois, arose, in his responsible position, on the floor of the House and impeached H. Snowden Marshall, district attorney for the southern district of the State of New York, charging the said H. Snowden Marshall with numerous malfeasances and misfeasances and with corrupt and improper behavior and conduct in office. Immediately after the reading of said charges, Representative Buchanan offered for the immediate consideration of the House resolution 90, which provided, among other things, "that the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of H. Snowden Marshall," etc. After debate on the resolution, the House, upon motion of Mr. Fitzgerald, of New York, referred the resolution to the Committee on the Judiciary for its consideration and action.

The Committee on the Judiciary immediately began the consideration of said resolution and called Representative Buchanan before it to make such statement and furnish such information concerning the truth of his impeachment charges, as set out in House resolution 90, as he was able to make and furnish. Thereafter, on the 27th day of January, 1916, by direction of the Judiciary Committee, the chairman thereof offered in the House of Representatives the following resolution:

House resolution 110.

Resolved, That the Committee on the Judiciary in continuing their consideration of House resolution 90 be authorized and empowered to send for persons and papers, to subpœna witnesses, to administer oaths to such witnesses, and take their testimony.

The said committee is also authorized to appoint a subcommittee to act for and on behalf of the whole committee wherever it may be deemed advisable to take testimony for said committee. In case such subcommittee is appointed, it shall have the same powers in respect to obtaining testimony as are herein given to the Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall attend the sittings of such subcommittee and serve the process of same.

In case the Committee on the Judiciary or a subcommittee thereof deems it necessary it may employ such clerks and stenographers as are required to carry out the authority given in this resolution, and the expenses so incurred shall be paid out of the contingent fund of the House.

The Speaker of the House of Representatives shall have authority to sign, and the clerk thereof to attest, subpœnas for witnesses, and the Sergeant at Arms or a deputy shall serve them.

The said resolution was on said date unanimously agreed to.

While further considering the said House resolution 90 and the said House resolution 110, on the 31st day of January, 1916, the Committee on the Judiciary authorized the chairman to appoint a subcommittee of three to execute the purposes of House resolution 110 to act for and on behalf of the full committee wherever it may be deemed advisable to take testimony for said committee, and on February 1, 1916, the chairman appointed Messrs. Charles C. Carlin, Warren Gard, and John M. Nelson as members of such subcommittee.

Thereafter the said subcommittee organized and heard the testimony of certain witnesses in the Judiciary Committee rooms in the city of Washington. The subcommittee determined, for its further information and in carrying out the duties assigned it under the resolution of the House of Representatives, that it should hear the testimony of certain other witnesses in the city of New York, and on the 28th day of February, 1916, the said subcommittee, under subpœnas duly signed by the Speaker of the House of Representatives and attested by the clerk thereof, caused certain witnesses to be brought before it, in the Federal post-office building in the city of New York, and continued the examination of witnesses upon said charges up to and including the 4th day of March, 1916.

On the 3d day of March, 1916, there appeared in a New York newspaper an article containing, among other things, the following language:

It is the belief in the district attorney's office that the real aim of the Congress investigation is to put a stop to the criminal investigation of the pro-German partisans.

On the 3d of March, 1916, the subcommittee called before it one, Leonard R. Holme, who testified to the subcommittee that he wrote the article containing the foregoing language, but when asked whether or not he conferred with anybody in the district attorney's office before the article was written replied that he declined to give the source of his information. The chairman of the subcommittee then propounded this question to the witness, "Did you confer with Mr. Marshall before you wrote this article?" To which the witness replied, "I respectfully decline to answer the question, sir." The chairman of the subcommittee then propounded the following question to him, "Did you confer with anybody in Mr. Marshall's office?" To which the witness replied, "I respectfully decline to answer that question, sir."

Whereupon, the sergeant at arms was directed by the chairman of the subcommittee to take charge of the witness and keep him in custody until the further order of the committee. At 4.10 o'clock

p. m. of the same day, the chairman of the subcommittee again propounded the foregoing questions to Witness Holme, and the following proceedings were had:

Mr. CARLIN. Mr. Holme, the committee has directed me to order you to answer question which was asked you. Mr. Stenographer, read the testimony of Mr. Holme.

(The entire previous testimony of Mr. Holme was read to the committee by the stenographer in the hearing of the committee only.)

Mr. CARLIN. Mr. Holme, I hand you this article in the sixth column of page 4 of the New York Times, dated Friday, March 3, 1916. The article is headed "Marshall refuses Buchanan evidence." I now call your attention to this paragraph of the article:

"It is the belief in the district attorney's office that the real aim of the Congress investigation is to put a stop to the criminal investigation of the pro-German partisans."

I ask you from whom you got that information?

Mr. HOLME. That information, sir, is a deduction. I have known at the time these proceedings were begun in Washington, it was before the indictment of Congressman Buchanan, that there had been a considerable amount of talk around this building as to their nature. I am down here practically every day of my life, and I meet with a great many men who are connected with the district attorney's office and who are in this building in various other regular capacities, and I based that paragraph entirely upon my knowledge of the general gossip around the building and the general feeling in the building.

Mr. CARLIN. Why did you not state that, instead of saying it is the belief in the district attorney's office?

Mr. HOLME. Well, sir, it comes to much the same thing, does it not? The district attorney's office is a large organization.

Mr. CARLIN. Is that your answer?

Mr. HOLME. Yes, sir.

Mr. CARLIN. Did you base that part of the article upon a conference held with H. Snowden Marshall or any subordinate of his in the district attorney's office?

Mr. HOLME. I based that article on my general knowledge of the conditions surrounding this proceeding and the general opinion floating around the building.

Mr. CARLIN. You state that it is the general belief in the district attorney's office. Now, who in the district attorney's office expressed that belief?

Mr. HOLME. I don't think I could give you any definite names, because I have discussed this matter with a large number of different people at various times.

Mr. CARLIN. As a matter of fact, did anybody in the district attorney's office express that belief?

Mr. HOLME. Yes, sir.

Mr. CARLIN. Who?

Mr. HOLME. I can only remember a very few, and I respectfully decline, as a newspaper man, to express their opinions, which are often given to me in general conversation.

Mr. CARLIN. Was the belief expressed by Mr. Marshall or either of his assistants?

Mr. HOLME. I respectfully decline to answer, sir.

Mr. CARLIN. Mr. Stenographer, insert in the record this article which I hand you, and the date line of the paper.

Mr. GARD. I understand you to say, Mr. Holme, that this extract which has been read to you was written by you?

Mr. HOLME. Yes, sir.

Mr. GARD. And the extract is this:

"It is the belief of the district attorney's office that the real aim of the congressional investigation is to put a stop to the criminal investigation of the pro-German partisans."

You wrote that?

Mr. HOLME. Yes, sir.

Mr. GARD. And I understand also that you decline and refuse to answer questions as to whether you obtained that information from anyone in the district attorney's office of the southern district of New York?

Mr. HOLME. Yes, sir.

Mr. GARD. You decline to answer that?

Mr. HOLME. Yes, sir.

Mr. CARLIN. Now, then, Mr. Holme, I am directed by the committee to order you to answer that. Do you still decline?

Mr. HOLME. I do, respectfully, sir.

Mr. CARLIN. Then, I am directed to say to you, for the record, that this committee determines you to be in contempt of the order of the committee and of the House of Representatives of the Congress of the United States, and that for the present you will be released from the custody of the marshal until the committee, if it sees proper, shall proceed in the manner prescribed by statute in such cases. We want to be kind to you. We have no desire to be harsh with you. We realize to some extent your embarrassment. We have a duty to discharge, and we think under the circumstances we will discharge it in this way and release you from the custody of the Sergeant at Arms of the House.

On Saturday, the 4th day of March, 1916, the said H. Snowden Marshall, as district attorney for the southern district of New York, caused to be transmitted to C. C. Carlin, chairman of said subcommittee, then in the performance of its duties, as required by the House of Representatives, the following letter:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 4, 1916.

SIR: Yesterday afternoon, as I am informed, your honorable committee ordered the arrest of Mr. L. R. Holme, a representative of a newspaper which had published an article at which you took offense. The unfortunate gentleman of the press was placed in custody under your orders. He was taken to the United States marshal to be placed in confinement (I do not understand whether his sentence was to be one day or a dozen years). The marshal very properly declined to receive the prisoner. This left you at a loss, and I am advised that you tried to work your way out of the awkward situation by having Mr. Holme brought back and telling him that you were disposed to be "kind" to him and then discharged him for the purpose of avoiding unpleasant consequences to yourselves.

You are exploiting charges against me of oppressive conduct toward a member of your honorable body who is charged with a violation of law and of oppressive conduct on my part toward shysters in the blackmailing and bankruptcy business.

I may be able to lighten your labors by offering to resign if you can indicate anything I ever did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.

The supposed justification of your order that Mr. Holme be placed in custody was his refusal to answer the question you asked as to where he got the information on which was based the article which displeased you.

It is not necessary for you to place anyone under arrest in order to get the answers to the question which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which he published and from which he made deductions, so that if your honorable committee has a grievance it is against me and not against him.

What I told him was about as follows:

I said that your expedition to this town was not an investigation conducted in good faith, but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

I said that your whole proceeding here was irregular and extraordinary; that I had never heard of such conduct of an impeachment proceeding; that charges of this sort were not usually heard in public until the House of Representatives had considered them and were willing to stand back of them.

I pointed out to him that you, contrary to usual practice, had come here and had held public hearings; that among your witnesses you had invited every rogue that you could lay your hands on to come before you and blackguard and slander me and my assistants under the full privilege of testifying before a congressional committee.

I told him that you had called one of my junior assistants before you and had attempted to make it publicly appear that his refusal to answer your questions as to what occurred in the grand jury room in the Buchanan case was due solely to my orders. I said that at the time you attempted to convey this public impression you knew that it was misleading because I had been asked by you to produce the minutes of the grand jury and had been instructed by the Attorney General not to comply with your request, as you well knew. I showed him the telegram of the Attorney General to me and showed him a copy of my letter to you, dated February 29, 1916, in which I sent you a copy of the telegram of the Attorney General instructing me not to give you the grand jury minutes.

I told him that you were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh and David Slade, in constant conference with you. I

said that I believed that every word of the evidence, whether in so-called secret sessions or not, had been placed at the disposal of these worthies, and that I would be just as willing to give the grand jury minutes to a defendant as to give them to your honorable subcommittee.

I told him that I did not share the views which seemed to prevail in your subcommittee on this subject. I said that I regarded a Member of Congress who would take money for an unlawful purpose from any foreign agent as a traitor, and that it was a great pity that such a person could only be indicted under the Sherman law, which carries only one year in jail as punishment.

I said that it was incomprehensible to me how your honorable subcommittee should rush to the assistance of an indicted defendant; how you had apparently resolved to prevent prosecution by causing the district attorney in charge to be publicly slandered.

I told him that I would not permit the prosecution of the persons whose cause you had apparently espoused to be impeded by you; I said that if you wanted the minutes of the grand jury in any case, you would not get them as long as I remained in office.

You will observe from the foregoing statement that what Mr. Holme published may have been based on what I said. If you have any quarrel, it is with me, and not with him.

It is amazing to me to think that you supposed that I did not understand what you have been attempting to do during your visit here. I realized that your effort was to ruin me and my office by publishing with your full approval the complaints of various persons who have run afoul of the criminal law under my administration. Your subcommittee has endeavored by insulting questions to my assistants and others, by giving publicity and countenance to the charges of rascals and by refusing to listen to the truth and refusing to examine public records to which your attention was directed, to publicly disgrace me and my office.

I propose to make this letter public.

Respectfully,

H. SNOWDEN MARSHALL,
United States Attorney.

Hon. C. C. CARLIN,
Chairman Subcommittee of the Judiciary Committee of the House of Representatives,
323 Federal Building, New York, N. Y.

At the same time or before this letter was sent to the subcommittee, it was given to the newspapers and published by them.

On the 9th day of March, 1916, the subcommittee aforesaid, through its chairman, Hon. C. C. Carlin, submitted to the Committee on the Judiciary the foregoing letter of H. Snowden Marshall.

On or about the 11th day of March, 1916, the following letter was received by the chairman of the Judiciary Committee and immediately laid before the full committee:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 10, 1916.

DEAR SIR: Referring to my letter of March 4, addressed to the chairman of the subcommittee which has recently taken testimony in New York concerning my administration of my office, I notice from the press that some persons appear to have construed my statements as directed toward your honorable committee as a whole. I beg to advise you that the criticisms in that letter were addressed to the methods pursued by the subcommittee. I do not retract nor modify any of those criticisms. But I did not intend (nor do I think my letter should be so construed) to reflect in any way upon the Judiciary Committee, nor did I question the power of the House of Representatives to order such an investigation.

If you and the other members of your committee, for whom I have high respect, have gained the impression that my letter carried any personal reflection upon your honorable committee, it gives me pleasure to assure you that I had no such purpose.

Respectfully,

H. SNOWDEN MARSHALL.

Hon. EDWIN Y. WEBB,
Chairman of the Judiciary Committee, House of Representatives, Washington, D. C.

The Judiciary Committee has carefully considered said letters in the light of congressional and judicial precedents as touching the prerogatives of the House of Representatives and its Members, and the committee has come to the determination that said letters, their publication and attendant circumstances, are of such nature, that they should be called to the attention of the House. For obvious reasons the committee deems it advisable to take this step rather than to report directly upon the facts and the law in the case. I am, therefore, directed by the committee to report the whole matter to the House of Representatives, with the recommendation that a select committee of five be appointed by the Speaker to report upon the facts in this case; the violations, if any, of the privileges of the House or the Committee on the Judiciary or the subcommittee thereof; the power of the House to punish for contempt; and the procedure in contempt proceedings, to the end that the privileges of the House shall be maintained and the rights of the Members protected in the performance of their official duties.

O

41 Twelfth. That such proceedings were thereupon had that the said House of Representatives duly passed and adopted a resolution, to wit, House Resolution 193, in the words and figures following, to wit:

..

42 64th Congress, 1st Session.

H. Res. 193.

In the House of Representatives.

April 5, 1916.

Mr. Kitchin submitted the following resolution which was considered and agreed to:

Resolution.

Resolved, That a select committee of five members be appointed forthwith by the Speaker to consider the report, in the nature of a statement, from the Judiciary Committee with reference to certain conduct of H. Snowden Marshall, and to report to the House of Representatives the facts in the case; the violations, if any, of the privileges of the House of Representatives or of the Committee on the Judiciary, or of the subcommittee thereof; the power of the House to punish for contempt; and the procedure in contempt proceedings, in case they find a contempt has been committed, to the end that the privileges of the house shall be maintained and the rights of Members protected in the performance of their official duties.

43 The select committee shall have the power to send for persons and papers and shall submit its report to the House not later than April fourteenth, nineteen hundred and sixteen.

[Endorsed:] 64th Congress, 1st Session. H. Res. 193. Resolution authorizing the Speaker to appoint a select committee to consider the report of the Committee on the Judiciary relative to certain conduct of H. Snowden Marshall. By Mr. Kitchin. April 5, 1916.—Considered and agreed to.

44 Thirteenth. That pursuant to the aforesaid House Resolution 193, the Speaker of the House appointed a select committee of five members. That said committee met and organized, and thereupon, agreeably to said House Resolution 193, sent for persons and papers, and proceeded to consider the matters referred to them. That said H. Snowden Marshall, upon the invitation of said committee appeared before the said committee at the Capitol, in the City of Washington; and, as appears from the proceedings before the said committee, which are set forth in the appendix attached to the report of the committee (Report No. 544), hereinafter referred

to, the said Marshall admitted that he wrote the letter of March 4, 1916, and, amongst other things, stated that there was not a word in it which is not true; that under the same circumstances, he should write the same letter again.

Fourteenth. That the said select committee, through its Chairman, the Honorable John A. Moon, made its report to the House of Representatives, which report is Report No. 544 of the First Session of the Sixty-fourth Congress, a copy of which is hereto appended, and a copy of which was also furnished and delivered to the petitioner, Marshall, at the time of his arrest by me.

Fifteenth. That amongst other things, as appears by the
45 said report, the committee reported to the House, that they concluded and found that the said letter written and published by said H. Snowden Marshall, dated March 4, 1916, is as a whole, and in several separate sentences, defamatory and insulting, and tends to bring the House into public contempt and ridicule, and that the said H. Snowden Marshall by writing and publishing the same, is guilty of a contempt of the House of Representatives of the United States, because of a violation of its privileges, its honor and its dignity; and further, that the said H. Snowden Marshall, in writing and publishing the letter, is guilty of a breach of the privileges and a contempt of the House of Representatives, and he should be brought to the bar of the House to answer such charge.

Sixteenth. That after the submission to the House by the select committee of its report, to wit, Report No. 544, and on the 20th day of June, 1916, the House of Representatives agreed to and duly passed and adopted House Resolution 268, which is in the words and figures following, to wit:

46 64th Congress, 1st Session.

H. Res. 268.

In the House of Representatives.

June 20, 1916.

Mr. Moon submitted the following resolution which was agreed to;

Resolution.

Resolved, That the Speaker do issue his warrant, directed to the Sergeant at Arms, commanding him to take in custody, wherever to be found, the body of H. Snowden Marshall, of the State of New York, and to proceed forthwith to bring the said H. Snowden Marshall to the bar of the House of Representatives, to answer the charge

that he, on March fourth, nineteen hundred and sixteen, in the city of New York, did violate the privileges of the House of Representatives of the United States by writing and causing to be published the following letter:

47 DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
NEW YORK, March 4, 1916.

SIR: Yesterday afternoon, as I am informed, your honorable committee ordered the arrest of Mr. L. R. Holme, a representative of a newspaper which had published an article at which you took offense. The unfortunate gentleman of the press was placed in custody under your orders. He was taken to the United States marshal to be placed in confinement (I do not understand whether his sentence was to be one day or a dozen years). The marshal very properly declined to receive the prisoner. This left you at a loss, and I am advised that you tried to work your way out of the awkward situation by having Mr. Holme brought back and telling him that you were disposed to be "kind" to him, and then discharged him for the purpose of avoiding unpleasant consequences to yourselves.

You are exploiting charges against me of oppressive conduct toward a Member of your honorable body who is charged with a violation of law and of oppressive conduct on my part toward shysters in the blackmailing and bankruptcy business.

I may be able to lighten your labors by offering to resign
48 if you can indicate anything I ever did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.

The supposed justification of your order that Mr. Holme be placed in custody was his refusal to answer the question you asked as to where he got the information on which was based the article which displeased you.

It is not necessary for you to place anyone under arrest in order to get the answers to the question which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which he published and from which he made deductions, so that if your honorable committee has a grievance, it is against me and not against him.

What I told him was about as follows:

I said that your expedition to this town was not an investigation conducted in good faith, but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

I said that your whole proceeding here was irregular and extraordinary; that I had never heard of such conduct of an impeachment proceeding; that charges of this sort were not usually heard in public until the House of Representatives had considered them and were willing to stand back of them.

49 I pointed out to him that you, contrary to usual practice, had come here and had held public hearings; that among

your witnesses you had invited every rogue that you could lay your hands on to come before you and blackguard and slander me and my assistants under the full privilege of testifying before a congressional committee.

I told him that you had called one of my junior assistants before you and had attempted to make it publicly appear that his refusal to answer your questions as to what occurred in the grand jury room in the Buchanan case was due solely to my orders. I said that at the time you attempted to convey this public impression you knew that it was misleading because I had been asked by you to produce the minutes of the grand jury and had been instructed by the Attorney General not to comply with your request, as you well knew. I showed him the telegram of the Attorney General to me and showed him a copy of my letter to you, dated February twenty-ninth, nineteen hundred and sixteen, in which I sent you a copy of the telegram of the Attorney General instructing me not to give you the grand jury minutes.

I told him that you were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh and David Slade, in constant conference with you. I said that I believed that
50 every word of the evidence, whether in so-called secret sessions or not, had been placed at the disposal of these worthies, and that I would be just as willing to give the grand jury minutes to a defendant as to give them to your honorable subcommittee.

I told him that I did not share the views which seemed to prevail in your subcommittee on this subject. I said that I regarded a Member of Congress who would take money for an unlawful purpose from any foreign agent as a traitor, and that it was a great pity that such a person could only be indicted under the Sherman law, which carries only one year in jail as punishment.

I said that it was incomprehensible to me how your honorable subcommittee should rush to the assistance of an indicted defendant; how you had apparently resolved to prevent prosecution by causing the district attorney in charge to be publicly slandered.

I told him that I would not permit the prosecution of the persons whose cause you had apparently espoused to be impeded by you; I said that if you wanted the minutes of the grand jury in any case, you would not get them as long as I remained in office.

You will observe from the foregoing statement that what Mr. Holme published may have been based on what I said. If you have any quarrel, it is with me, and not with him.

51 It is amazing to me to think that you supposed that I did not understand what you have been attempting to do during your visit here. I realized that your effort was to ruin me and my office by publishing with your full approval the complaints of various persons who have run afoul of the criminal law under my administration. Your subcommittee has endeavored, by insulting questions to my assistants and others, by giving publicity and counte-

nance to the charges of rascals, and by refusing to listen to the truth and refusing to examine public records to which your attention was directed, to publicly disgrace me and my office.

I propose to make this letter public.

Respectfully,

H. SNOWDEN MARSHALL,
United States Attorney.

Hon. C. C. Carlin, Chairman Subcommittee of the Judiciary Committee of the House of Representatives, 323 Federal Building, New York, N. Y.

Resolved, That the said H. Snowden Marshall, in writing and publishing said letter, was guilty of a breach of the privileges and a contempt of the House of Representatives, and that the said H. Snowden Marshall be furnished with a copy of this resolu-
52 tion, and a copy of the report of the select committee of the House of Reprtsentatives, appointed to investigate the charges made against him in the House of Representatives.

Resolved further, That when H. Snowden Marshall shall be brought to the bar of the House, to answer the charge of having violated the privileges of the House of Representatives, as afore set out, the Speaker shall then cause to be read to said H. Snowden Marshall the findings of fact and findings of law by the special committee of the House, charged with the duty of investigating whether or not the said H. Snowden Marshall had violated the privileges of the House of Representatives or was in contempt of same; the Speaker shall then inquire of said H. Snowden Marshall if he desires to be heard, and to have counsel on the charge of being in contempt of the House of Representatives for having violated its privileges. If the said H. Snowden Marshall desires to avail himself of either of these privileges, the same shall be granted him. If not, the House shall thereupon proceed to take order in the matter.

53 [Endorsed:] 64th Congress, 1st Session. H. Res. 268. Resolution directing the Sergeant at Arms to take in custody the body of H. Snowden Marshall, of the State of New York. By Mr. Moon. June 20, 1916.—Agreed to.

54 Seventeenth. That pursuant to the last aforesaid resolution, a warrant was duly issued, signed by the Honorable Champ Clark, the Speaker of the House of Representatives, and duly delivered to me, and which is the warrant set forth in this amended return, under which I hold the said H. Snowden Marshall, for the purpose of bringing him as commanded before the House of Representatives.

Wherefore, I, as the respondent herein, as well as on behalf of the House of Representatives, and by its direction, ask that the writ of habeas corpus herein be dismissed, and that the said H. Snowden

Marshall may be remanded in my custody, that I may bring him to the bar of the House of Representatives, as by the said warrant I am commanded.

R. B. GORDON,
Sgt.-at-Arms of the House of Representatives.

W. CADY HERRICK,
MARTIN W. LITTLETON,
HENRY M. GOLDFOGLE,
Of Counsel for Respondent.

64TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 544.

H. SNOWDEN MARSHALL.

APRIL 14, 1916.—Referred to the House Calendar and ordered to the printed.

Mr. MOON, from the select committee appointed pursuant to H. Res. 193, submitted the following

REPORT.

The select committee of the House of Representatives was appointed under House resolution 193, which is as follows:

[H. Res. 193, Sixty-fourth Congress, first session.]

Resolved, That a select committee of five members be appointed forthwith by the Speaker to consider the report, in the nature of a statement, from the Judiciary Committee with reference to certain conduct of H. Snowden Marshall, and to report to the House of Representatives the facts in the case; the violations, if any, of the privileges of the House of Representatives or of the Committee on the Judiciary, or of the subcommittee thereof; the power of the House to punish for contempt; and the procedure in contempt proceedings, in case they find a contempt has been committed, to the end that the privileges of the House shall be maintained and the rights of Members protected in the performance of their official duties.

The select committee shall have the power to send for persons and papers and shall submit its report to the House not later than April fourteenth, nineteen hundred and sixteen.

The report upon which this resolution was predicated and to which it refers is as follows:

[House Report No. 494, Sixty-fourth Congress, first session.]

ALLEGED OFFICIAL MISCONDUCT OF H. SNOWDEN MARSHALL.

[April 5, 1916.—Ordered to be printed.]

Mr. Webb, from the Committee on the Judiciary, submitted the following report (to accompany H. Res. 193):

By direction of the Committee on the Judiciary, I beg leave to make the following report, in the nature of a statement, to the House of Representatives. On the 12th day of January, 1916, Hon. Frank Buchanan, a Representative in Congress from the State of Illinois, arose, in his responsible position, on the floor of the House and impeached H. Snowden Marshall, district attorney for the southern district of the State of New York, charging the said H. Snowden Marshall with numerous malfeasances and misfeasances and with corrupt and improper behavior and conduct in office. Immediately after the reading of said charges Representative Buchanan offered, for the immediate consideration of the House, resolution 90, which provided, among other things, "that

the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of H. Snowden Marshall," etc. After debate on the resolution the House, upon motion of Mr. Fitzgerald, of New York, referred the resolution to the Committee on the Judiciary for its consideration and action.

The Committee on the Judiciary immediately began the consideration of said resolution and called Representative Buchanan before it to make such statement and furnish such information concerning the truth of his impeachment charges, as set out in House resolution 90, as he was able to make and furnish. Thereafter, on the 27th day of January, 1916, by direction of the Judiciary Committee, the chairman thereof offered in the House of Representatives the following resolution:

[House resolution 110.]

"*Resolved*, That the Committee on the Judiciary in continuing their consideration of House resolution 90 be authorized and empowered to send for persons and papers, to subpœna witnesses, to administer oaths to such witnesses, and take their testimony.

"The said committee is also authorized to appoint a subcommittee to act for and on behalf of the whole committee wherever it may be deemed advisable to take testimony for said committee. In case such subcommittee is appointed, it shall have the same powers in respect to obtaining testimony as are herein given to the Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall attend the sittings of such subcommittee and serve the process of same.

"In case the Committee on the Judiciary or a subcommittee thereof deems it necessary it may employ such clerks and stenographers as are required to carry out the authority given in this resolution, and the expenses so incurred shall be paid out of the contingent fund of the House.

"The Speaker of the House of Representatives shall have authority to sign and the Clerk thereof to attest, subpœnas for witnesses, and the Sergeant at Arms or a deputy shall serve them."

The said resolution was on said date unanimously agreed to.

While further considering the said House resolution 90 and the said House resolution 110, on the 31st day of January, 1916, the Committee on the Judiciary authorized the chairman to appoint a subcommittee of three to execute the purposes of House resolution 110 to act for and on behalf of the full committee wherever it may be deemed advisable to take testimony for said committee, and on February 1, 1916, the chairman appointed Messrs. Charles C. Carlin, Warren Gard, and John M. Nelson as members of such subcommittee.

Thereafter the said subcommittee organized and heard the testimony of certain witnesses in the Judiciary Committee rooms in the city of Washington. The subcommittee determined, for its further information and in carrying out the duties assigned it under the resolution of the House of Representatives, that it should hear the testimony of certain other witnesses in the city of New York, and on the 28th day of February, 1916, the said subcommittee, under subpœnas duly signed by the Speaker of the House of Representatives and attested by the Clerk thereof, caused certain witnesses to be brought before it, in the Federal post-office building in the city of New York, and continued the examination of witnesses upon said charges up to and including the 4th day of March, 1916.

On the 3d day of March, 1916, there appeared in a New York newspaper an article containing, among other things, the following language:

"It is the belief in the district attorney's office that the real aim of the Congress investigation is to put a stop to the criminal investigation of the pro-German partisans."

On the 3d of March, 1916, the subcommittee called before it one Leonard R. Holme, who testified to the subcommittee that he wrote the article containing the foregoing language, but when asked whether or not he conferred with anybody in the district attorney's office before the article was written replied that he declined to give the source of his information. The chairman of the subcommittee then propounded this question to the witness: "Did you confer with Mr. Marshall before you wrote this article?" To which the witness replied "I respectfully decline to answer the question, sir." The chairman of the subcommittee then propounded the following question to him: "Did you confer with anybody in Mr. Marshall's office?" To which the witness replied, "I respectfully decline to answer that question, sir."

Whereupon, the Sergeant at Arms was directed by the chairman of the subcommittee to take charge of the witness and keep him in custody until the further order of the committee. At 4.10 o'clock p. m. of the same day, the chairman of the subcommittee again propounded the foregoing questions to Witness Holme, and the following proceedings were had:

"Mr. CARLIN. Mr. Holme, the committee has directed me to order you to answer the question which was asked you. Mr. Stenographer, read the testimony of Mr. Holme.

"(The entire previous testimony of Mr. Holme was read to the committee by the stenographer in the hearing of the committee only.)

"Mr. CARLIN. Mr. Holme, I hand you this article in the sixth column of page 4 of the New York Times, dated Friday, March 3, 1916. The article is headed 'Marshall refuses Buchanan evidence.' I now call your attention to this paragraph of the article:

"'It is the belief in the district attorney's office that the real aim of the Congress investigation is to put a stop to the criminal investigation of the pro-German partisans.'

"I ask you from whom you got that information?

"Mr. HOLME. That information, sir, is a deduction. I have known at the time these proceedings were begun in Washington, it was before the indictment of Congressman Buchanan, that there had been a considerable amount of talk around this building as to their nature. I am down here practically every day of my life, and I meet with a great many men who are connected with the district attorney's office and who are in this building in various other regular capacities, and I based that paragraph entirely upon my knowledge of the general gossip around the building and the general feeling in the building.

"Mr. CARLIN. Why did you not state that, instead of saying it is the belief in the district attorney's office?

"Mr. HOLME. Well, sir, it comes to much the same thing, does it not? The district attorney's office is a large organization.

"Mr. CARLIN. Is that your answer?

"Mr. HOLME. Yes, sir.

"Mr. CARLIN. Did you base that part of the article upon a conference held with H. Snowden Marshall or any subordinate of his in the district attorney's office?

"Mr. HOLME. I based that article on my general knowledge of the conditions surrounding this proceeding and the general opinion floating around the building.

"Mr. CARLIN. You state that it is the general belief in the district attorney's office. Now, who in the district attorney's office expressed that belief?

"Mr. HOLME. I don't think I could give you any definite names, because I have discussed this matter with a large number of different people at various times.

"Mr. CARLIN. As a matter of fact, did anybody in the district attorney's office express that belief?

"Mr. HOLME. Yes, sir.

"Mr. CARLIN. Who?

"Mr. HOLME. I can only remember a very few, and I respectfully decline, as a newspaper man, to express their opinions, which are often given to me in general conversation.

"Mr. CARLIN. Was the belief expressed by Mr. Marshall or either of his assistants?

"Mr. HOLME. I respectfully decline to answer, sir.

"Mr. CARLIN. Mr. Stenographer, insert in the record this article which I hand you, and the date line of the paper.

"Mr. GARD. I understand you to say, Mr. Holme, that this extract which has been read to you was written by you?

"Mr. HOLME. Yes, sir.

"Mr. GARD. And the extract is this:

"'It is the belief of the district attorney's office that the real aim of the congressional investigation is to put a stop to the criminal investigation of the pro-German partisans.'

"You wrote that?

"Mr. HOLME. Yes, sir.

"Mr. GARD. And I understand also that you decline and refuse to answer questions as to whether you obtained that information from anyone in the district attorney's office of the southern district of New York?

"Mr. HOLME. Yes, sir.

"Mr. GARD. You decline to answer that?

"Mr. HOLME. Yes, sir.

"Mr. CARLIN. Now, then, Mr. Holme, I am directed by the committee to order you to answer that. Do you still decline?

"Mr. HOLME. I do, respectfully, sir.

"Mr. CARLIN. Then, I am directed to say to you, for the record, that this committee determines you to be in contempt of the order of the committee and of the House of Representatives of the Congress of the United States, and that for the present you will be released from the custody of the marshal until the committee, if it sees proper, shall proceed in the manner prescribed by statute in such cases. We want to be kind to you. We have no desire to be harsh with you. We realize to some extent your embarrassment. We have a duty to discharge, and we think under the circumstances we will discharge it in this way and release you from the custody of the Sergeant at Arms of the House."

On Saturday, the 4th day of March, 1916, the said H. Snowden Marshall, as district attorney for the southern district of New York, caused to be transmitted to C. C. Carlin, chairman of said subcommittee, then in the performance of its duties, as required by the House of Representatives, the following letter:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 4, 1916.

SIR: Yesterday afternoon, as I am informed, your honorable committee ordered the arrest of Mr. L. R. Holme, a representative of a newspaper which had published an article at which you took offense. The unfortunate gentleman of the press was placed in custody under your orders. He was taken to the United States marshal to be placed in confinement (I do not understand whether his sentence was to be one day or a dozen years). The marshal very properly declined to receive the prisoner. This left you at a loss, and I am advised that you tried to work your way out of the awkward situation by having Mr. Holme brought back and telling him that you were disposed to be "kind" to him and then discharged him for the purpose of avoiding unpleasant consequences to yourselves.

You are exploiting charges against me of oppressive conduct toward a member of your honorable body who is charged with a violation of law and of oppressive conduct on my part toward shysters in the blackmailing and bankruptcy business.

I may be able to lighten your labors by offering to resign if you can indicate anything I ever did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.

The supposed justification of your order that Mr. Holme be placed in custody was his refusal to answer the question you asked as to where he got the information on which was based the article which displeased you.

It is not necessary for you to place anyone under arrest in order to get the answers to the question which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which he published and from which he made deductions, so that if your honorable committee has a grievance it is against me and not against him.

What I told him was about as follows:

I said that your expedition to this town was not an investigation conducted in good faith; but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

I said that your whole proceeding here was irregular and extraordinary; that I had never heard of such conduct of an impeachment proceeding; that charges of this sort were not usually heard in public until the House of Representatives had considered them and were willing to stand back of them.

I pointed out to him that you, contrary to usual practice, had come here and had held public hearings; that among your witnesses you had invited every rogue that you could lay your hands on to come before you and blackguard and slander me and my assistants under the full privilege of testifying before a congressional committee.

I told him that you had called one of my junior assistants before you and had attempted to make it publicly appear that his refusal to answer your questions as to what occurred in the grand jury room in the Buchanan case was due solely to my orders. I said that at the time you attempted to convey this public impression you knew that it was misleading because I had been asked

by you to produce the minutes of the grand jury and had been instructed by the Attorney General not to comply with your request, as you well knew. I showed him the telegram of the Attorney General to me and showed him a copy of my letter to you, dated February 29, 1916, in which I sent you a copy of the telegram of the Attorney General instructing me not to give you the grand jury minutes.

I told him that you were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh and David Slade, in constant conference with you. I said that I believed that every word of the evidence, whether in so-called secret sessions or not, had been placed at the disposal of these worthies, and that I would be just as willing to give the grand jury minutes to a defendant as to give them to your honorable subcommittee.

I told him that I did not share the views which seemed to prevail in your subcommittee on this subject. I said that I regarded a Member of Congress who would take money for an unlawful purpose from any foreign agent as a traitor, and that it was a great pity that such a person could only be indicted under the Sherman law, which carries only one year in jail as punishment.

I said that it was incomprehensible to me how your honorable subcommittee should rush to the assistance of an indicted defendant; how you had apparently resolved to prevent prosecution by causing the district attorney in charge to be publicly slandered.

I told him that I would not permit the prosecution of the persons whose cause you had apparently espoused to be impeded by you; I said that if you wanted the minutes of the grand jury in any case, you would not get them as long as I remained in office. You will observe from the foregoing statement that what Mr. Holme published may have been based on what I said. If you have any quarrel, it is with me, and not with him.

It is amazing to me to think that you supposed that I did not understand what you have been attempting to do during your visit here. I realized that your effort was to ruin me and my office by publishing with your full approval the complaints of various persons who have run afoul of the criminal law under my administration. Your subcommittee has endeavored by insulting questions to my assistants and others, by giving publicity and countenance to the charges of rascals and by refusing to listen to the truth and refusing to examine public records to which your attention was directed, to publicly disgrace me and my office.

I propose to make this letter public.

Respectfully,

H. SNOWDEN MARSHALL,
United States Attorney.

Hon. C. C. CARLIN,
Chairman Subcommittee of the Judiciary Committee
of the House of Representatives,
323 Federal Building, New York, N. Y.

At the same time or before this letter was sent to the subcommittee it was given to the newspapers and published by them.

On the 9th day of March, 1916, the subcommittee aforesaid, through its chairman, Hon. C. C. Carlin, submitted to the Committee on the Judiciary the foregoing letter of H. Snowden Marshall.

On or about the 11th day of March, 1916, the following letter was received by the chairman of the Judiciary Committee and immediately laid before the full committee:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 10, 1916.

DEAR SIR: Referring to my letter of March 4, addressed to the chairman of the subcommittee which has recently taken testimony in New York concerning my administration of my office, I notice from the press that some persons appear to have construed by statements as directed toward your honorable committee as a whole. I beg to advise you that the criticisms in that letter were addressed to the methods pursued by the subcommittee. I do not retract nor modify any of those criticisms. But I did not intend (nor do I think my letter should be so construed) to reflect in any way upon the Judiciary Committee, nor did I question the power of the House of Representatives to order such an investigation.

If you and the other members of your committee, for whom I have high respect, have gained the impression that my letter carried any personal reflection upon your honorable committee, it gives me pleasure to assure you that I had no such purpose.

Respectfully,

H. SNOWDEN MARSHALL.

Hon. EDWIN Y. WEBB,
Chairman of the Judiciary Committee,
House of Representatives, Washington, D. C.

The Judiciary Committee has carefully considered said letters in the light of congressional and judicial precedents as touching the prerogatives of the House of Representatives and its Members, and the committee has come to the determination that said letters, their publication and attendant circumstances, are of such nature that they should be called to the attention of the House. For obvious reasons the committee deems it advisable to take this step rather than to report directly upon the facts and the law in the case. I am, therefore, directed by the committee to report the whole matter to the House of Representatives with the recommendation that a select committee of five be appointed by the Speaker to report upon the facts in this case; the violations, if any, of the privileges of the House or the Committee on the Judiciary or the subcommittee thereof; the power of the House to punish for contempt; and the procedure in contempt proceedings, to the end that the privileges of the House shall be maintained and the rights of the Members protected in the performance of their official duties.

The select committee appointed under House resolution 193 met for the hearing on Friday, April 7, 1916, at 10 a. m., and took the testimony of Representatives Webb, Gard, Nelson, and Carlin and directed the chairman to send the following letter to Hon. H. Snowden Marshall, of New York, and then adjourned to 10 a. m., Monday, April 10, 1916:

APRIL 7, 1916.

Hon. H. SNOWDEN MARSHALL,
United States District Attorney for the
Southern District of New York, New York City.

DEAR SIR: Inclosed is H. Res. 193 and Report No. 494, which explain themselves. The select committee appointed by the Speaker of the House of Representatives are now engaged in the investigation of the matters referred to herein. We will be glad to have you appear before us, if you so desire, at the rooms of the Committee on the Post Office and Post Roads of the House of Representatives, in the Capitol Building, Washington, D. C., on Monday, April 10, 1916, at 10 o'clock a. m., and make such statement as you may desire before the committee touching this matter. As the time of the committee is limited in which to report, you will oblige us by advising by wire whether you desire to be present or not. This communication is made to you by order of the select committee.

Very truly, yours,

JOHN A. MOON,
Chairman Select Committee.

This letter was mailed to Mr. Marshall on the 7th of April, 1916. On April 8, 1916, the following reply was received by wire:

NEW YORK, N. Y., *April 8, 1916.*

Hon. JOHN A. MOON,
Washington, D. C.:

Your letter received. It will give me pleasure to appear before your committee at the time and place mentioned in your letter.

H. SNOWDEN MARSHALL.

The committee met again at 10 a. m., April 10, 1916, pursuant to adjournment, when Mr. Marshall appeared and was given a steno-

graphic copy of the statements of witnesses who had testified in the case, and was advised that he would be given an opportunity before making his statement to read the same and cross-examine the witnesses. Thereupon the committee adjourned to 1.30 p. m., April 10, 1916, this being deemed sufficient time by Mr. Marshall in which to examine the statements of the witnesses.

The select committee met again at 1.30 p. m., April 10, 1916. Mr. Marshall appeared and made a statement in writing and testified orally. He also subsequently submitted an additional statement on April 12, 1916, and some newspaper clippings. The statements and testimony of all the witnesses who appeared before the select committee are attached hereto as an appendix to this report. The newspaper clippings are not strictly relevant, but are filed. There was also filed as evidence for reference the hearings in the case of charges against H. Snowden Marshall, taken by a subcommittee of the Committee on the Judiciary in New York on February 28, 1916, and following. These hearings are material mainly in determining whether the subcommittee making the investigation was acting within the scope of its authority.

FINDING OF FACTS.

1. H. Snowden Marshall is and has been for several years past United States district attorney for the southern district of New York.

2. On the 28th day of December, 1915, the grand jury in the United States District Court for the Southern District of New York found an indictment against a Member of the House, Hon. Frank Buchanan, and others, for the violation of a Federal Statute. (We have not been furnished with a copy of this indictment and therefore can not incorporate it in this report.)

3. On December 14, 1915, preceding the finding of the indictment Hon. Frank Buchanan, a Representative in Congress from the State of Illinois, impeached H. Snowden Marshall, the United States district attorney for the southern district of New York, of malfeasance and misfeasance in office. On January 12, 1916, said Representative Buchanan again presented to the House charges and impeached the said H. Snowden Marshall, United States district attorney for the southern district of New York, as follows:

IMPEACHMENT OF H. SNOWDEN MARSHALL.

The SPEAKER. The gentleman from Illinois [Mr. Buchanan] is recognized.

Mr. BUCHANAN of Illinois. Mr. Speaker, I rise to a question of the highest privilege. By virtue of my office as a Member of the House of Representatives I impeach H. Snowden Marshall, United States district attorney for the southern district of New York, of high crimes and misdemeanors.

I charge him with having conspired with persons, firms, and corporations, their agents and servants, to grant such persons, firms and corporations the privilege of violating various criminal, neutrality, interstate commerce, or custom laws of the United States in the southern district of New York.

I charge him with securing for persons or corporations great financial profit in consequence of the violation of the United States laws.

I charge him with corruptly and collusively participating in such conspiracies.

I charge him with corruptly neglecting and refusing to prosecute gross and notorious violations of various criminal, neutrality, custom revenue, and antitrust laws of the United States within said judicial district.

I charge him with corruptly inducing and procuring grand juries to return into the district court for the southern district of New York of indictments

charging crimes without there being evidence before said grand jury which would in any degree justify the finding and filing of such indictments.

I charge him with being guilty of oppression in corruptly procuring indictments from the grand jury in said district charging reputable citizens with crime, although there was no evidence before the grand jury which would in the least warrant such charges.

I charge him with corruptly conspiring with other persons to spread broadcast throughout the United States maliciously false newspaper publications and reports, emanating as official statements and purporting to describe results of investigations conducted by said United States attorney and his assistants, with the object of destroying friendly relations between the United States and one or more foreign governments.

I charge him with unlawfully and feloniously abusing the legal process before the grand jury in said district of New York, the Secret Service, and the Bureau of Investigation and Inquiry of the Department of Justice in furtherance of such conspiracy aforesaid.

I charge him with having knowledge of the existence of circumstances from which knowledge is imputed to him that large sums of money have been expended for or on behalf of foreign Governments and of various purveyors and manufacturers of war munitions for the purpose of influencing the actions of said United States attorney in furtherance of a conspiracy.

I charge him with having corruptly neglected or refused to prosecute men who have made the port of New York, within said judicial district, a military or naval base for foreign belligerent powers.

I charge him with corruptly neglecting and refusing to prosecute violations of Federal statutes prohibiting the loading and shipment of explosives on ships carrying passengers within said judicial district.

I charge him with corruptly neglecting and refusing to prosecute violations of the foreign-enlistment act and laws of the United States within said district.

I charge him with having corruptly used the powers of his office for the purpose of slandering and libeling peaceable and law-abiding people to their great injury.

I charge him with having abetted, approved, acquiesced, and permitted unlawful and oppressive misuse of subpœnas and other process before grand juries in said southern district of New York.

I charge him with having deprived law-abiding citizens of their legal rights, privileges and immunities.

I charge him with aiding, abetting, and approving unlawful expenditures of public moneys in violation of the laws of the United States.

I charge him with being guilty of attempts by private solicitation of influencing the official actions and opinions of judges in the southern district of New York while in the performance of their judicial duties.

I charge him with having used the powers of his office to cause and procure a discrimination in the assignment of judges to conduct trials in said district, so as to discriminate against one or more resident judges.

I charge him with having used the powers of his office to procure or assist in the procurement of judges to be imported into the southern district of New York from other districts for the trial of cases in said district by falsely representing the condition of judicial business within said district.

I charge him with being guilty of private solicitation with intent to influence the official acts and decisions of judges imported as aforesaid.

I charge him with having attempted to corruptly control decisions and official actions of one or more of such imported judges.

I charge him with having procured the assignment of one or more imported judges for the conduct of trials in the said district for the purpose of preventing defendants in such cases from receiving a fair and impartial trial at the hands of resident judges.

I charge him with being a party to a conspiracy participated in by his assistant district attorneys and other officials connected with the administration of justice in the said southern district of New York, for the purpose of unlawfully manipulating and controlling the selection of grand and petit jurors in connection with cases in the courts of said district.

I charge him with having been guilty of acts by which the rights of the United States and that of individuals have been unlawfully prejudiced and the orderly and fair administration of justice defeated or obstructed in one or more instances.

I charge him with having employed the powers of his office for the purpose of shielding and to prevent the exposure of unlawful and improper conduct of

one James W. Osborne in relation to facts involved in civil litigation which was pending in the State court in the State of New York.

I charge him with unlawfully protecting the said Osborne and others from prosecution for the violation of United States laws.

I charge him with willfully and corruptly refusing and neglecting to prosecute gross and notorious violations of the United States statutes committed by said James W. Osborne and others in the city and State of New York within said district.

I charge him with having prostituted the office of United States district attorney for the southern district of New York.

I charge him with having used the powers of his said office as United States district attorney to corruptly and willfully defame, slander, and injure the good name and professional standing of law-abiding citizens of the United States, to their great injury, for the purpose of protecting the private individual interests of James W. Osborne.

I charge him with having corruptly failed, neglected, and refused to prosecute persons who, while acting as witnesses for the United States in the trial of causes, committed the crime of perjury, subornation of perjury, and conspiracy in connection with the cases of United States against Rae Tanzer, United States against Frank D. Safford, and United States against Albert J. McCullough et al.

I charge him with having used and employed the United States grand jury in the southern district of New York for the purpose of attempting to establish records which might be used in defense of James W. Osborne, H. Snowden Marshall, Roger B. Wood, and Samuel H. Hershenstein (the last two being assistant United States district attorneys under said H. Snowden Marshall), and not for the purpose of investigation of violations of the United States laws.

I charge him with corruptly and willfully failing to remove certain of his assistant district attorneys who destroyed documentary evidence material in the trial of a pending case in the United States district court for the southern district of New York.

I charge him with corruptly and maliciously causing to be instituted criminal proceedings against Rae Tanzer and others for the purpose of protecting James W. Osborne, a special United States district attorney and a personal intimate friend of said H. Snowden Marshall.

I charge him with corruptly and willfully failing and refusing to present to the court the trial of cases material and important evidence and in concealing or assisting and acquiescing in the concealment or destruction of material and important evidence relating to pending cases in the United States district court for the southern district of New York.

I charge him with being corrupt, grossly negligent, and unfit to retain the office as United States district attorney for the southern district of New York.

I charge him with having willfully and persistently violated the laws of the United States in connection with the performance by him of the duties of such United States district attorney for said southern district of New York.

I charge him with having corruptly and willfully withheld and failed to present before the grand jury material and important evidence in connection with alleged investigations instituted before said grand jury by said H. Snowden Marshall in relation to the cases of United States against Rae Tanzer and United States against Albert J. McCullough et al., and others.

I charge him with having corruptly and willfully refused and neglected to take cognizance of unlawful conduct of his assistant district attorneys in connection with the performance by them of official duties as such assistant district attorneys.

I charge him with corruptly participating in or acquiescing to the presentation to the court in trial of cases in the southern district of New York of alleged evidence which he knew to be untrue and manufactured, or in the manufacture of and attempt to manufacture such alleged evidence.

I charge him with producing willful injury and wrong to litigants in said district court and to citizens of the United States by his unlawful and improper conduct.

Mr. Speaker, I send up the following resolution to the desk to be read by the Clerk.

The SPEAKER. The Clerk will report the resolution.

The Clerk read as follows:

"*Resolved*, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of H. Snowden Marshall; whether he has conspired with

persons, firms, and corporations, their agents and servants, to grant such persons, firms, and corporations the privilege of violating various criminal, neutrality, interstate-commerce, or custom laws of the United States in the southern district of New York; whether he has secured for persons or corporations great financial profit in consequence of the violation of the United States laws; whether he has corruptly and collusively participated in such conspiracies; whether he has corruptly neglected and refused to prosecute gross and notorious violations of various criminal, neutrality, custom-revenue, and antitrust laws of the United States within said judicial district; whether he has corruptly induced and procured grand juries to return into the district court for the southern district of New York indictments charging crimes without there being evidence before said grand jury which would in any degree justify the finding and filing of such indictments; whether he has been guilty of oppression in corruptly procuring indictments from the grand jury in said district, charging reputable citizens with crime although there was no evidence before the grand jury which would in the least warrant such charges; whether he has corruptly conspired with other persons to spread broadcast throughout the United States maliciously false newspaper publications and reports emanating as official statements and purporting to describe results of investigations conducted by said United States attorney and his assistants with the object of destroying friendly relations between the United States and one or more foreign governments; whether he has unlawfully and feloniously abused the legal process before the grand jury in said district of New York, the Secret Service, and the Bureau of Investigation and Inquiry of the Department of Justice in furtherance of such conspiracy aforesaid; whether he has knowledge or whether there are in existence circumstances from which knowledge is imputed to him, that large sums of money have been expended for or on behalf of foreign governments and of various purveyors and manufacturers of war munitions for the purpose of influencing the actions of said United States attorney in furtherance of a conspiracy; whether he has corruptly neglected and refused to prosecute men who have made the port of New York within said judicial district a military and naval base for foreign belligerent powers; whether he has corruptly neglected and refused to prosecute violations of the Federal statutes prohibiting the loading and shipment of explosives on ships carrying passengers within said judicial district; whether he has corruptly neglected and refused to prosecute violations of the foreign enlistment act and laws of the United States; whether he has corruptly used the powers of his office for the purpose of slandering and libeling peaceable and law-abiding people to their great injury; whether he has abetted, approved, acquiesced in, and permitted unlawful and oppressive misuse of subpœnas and other process before the grand juries in said southern district of New York; whether he has deprived law-abiding citizens of their legal rights, privileges, and immunities; whether he has aided, abetted, and approved unlawful expenditures of public moneys in violation of the laws of the United States; whether he has been guilty of attempts by private solicitation to influence the official actions and opinions of judges in the southern district of New York while in the performance of their judicial duties; whether he has used the powers of his office to cause and procure a discrimination in the assignment of judges to conduct trials in said district so as to discriminate against one or more resident judges; whether he has used the powers of his office to procure or assist in the procurement of judges to be imported into the southern district of New York from other districts for the trial of cases in said district by falsely representing the condition of judicial business within said district; whether he has been guilty of private solicitation with intent to influence the official acts and decisions of judges imported as aforesaid; whether he has corruptly attempted to control decisions and official actions of one or more of such imported judges; whether he has procured the assignment of one or more imported judges for the conduct of trials in the said district for the purpose of preventing defendants in such cases from receiving a fair and impartial trial at the hands of resident judges; whether he has been a party to a conspiracy participated in by his assistant district attorneys and other officials connected with the administration of justice in the said southern district of New York, for the purpose of unlawfully manipulating and controlling the selection of grand and petit jurors in connection with cases in the courts of said district; whether he has been guilty of acts by which the rights of the United States and that of individuals have been unlawfully prejudiced and the orderly and fair administration of justice defeated or

obstructed in one or more instances; whether he has employed the powers of his office for the purpose of shielding and to prevent the exposure of unlawful and improper conduct of one James W. Osborne in relation to facts involved in civil litigation which was pending in the State court in the State of New York; whether he unlawfully protected the said Osborne and others from prosecution for the violation of United States laws; whether he has willfully and corruptly refused and neglected to prosecute gross and notorious violations of the United States Statutes committed by said James W. Osborne and others in the city and State of New York within said district; whether he has prosecuted the office of the United States district attorney for the southern district of New York; whether he has used the powers of his said office as United States district attorney to corruptly and willfully defame, slander, and injure the good name and professional standing of law-abiding citizens of the United States to their great injury for the purpose of protecting the private individual interests of James W. Osborne; whether he has corruptly failed, neglected, and refused to prosecute persons who, while acting as witnesses for the United States in the trial of causes, committed the crime of perjury, subornation of perjury, and conspiracy in connection with the cases of United States *v.* Rae Tanzer, United States *v.* Frank D. Safford, and United States *v.* Albert J. McCullough et al.; whether he used and employed the United States grand jury in the southern district of New York for the purpose of attempting to establish records, which might be used in defense of James W. Osborne, H. Snowden Marshall, Roger B. Wood, and Samuel H. Hershenstein (the last two being assistant United States district attorneys under said H. Snowden Marshall), and not for the purpose of investigation of violations of the United States laws; whether he has corruptly and willfully failed to remove certain of his assistant district attorneys who destroyed documentary evidence material in the trial of a pending case in the United States district court for the southern district of New York; whether he corruptly and maliciously caused to be instituted criminal proceedings against Rae Tanzer and others for the purpose of protecting James W. Osborne, a special United States district attorney and a personal intimate friend of said H. Snowden Marshall; whether he has corruptly and willfully failed and refused to present to the court the trial of cases material and important evidence and in concealing or assisting and acquiescing in the concealment or destruction of material and important evidence relating to pending cases in the United States district court for the southern district of New York; wheher he is corrupt, grossly negligent, and unfit to retain the office as United States district attorney for the southern district of New York; whether he has willfully and persistently violated the laws of the United States in connection with the performance by him of the duties of such United States district attorney for said southern district of New York; whether he has corruptly and willfully withheld and failed to present before the grand jury material and important evidence in connnection with alleged investigations instituted before said grand jury by said H. Snowden Marshall in relation to the cases of United States *v.* Rae Tanzer and United States *v.* Albert J. McCullough et al. and others; whether he has corruptly and willfully refused and neglected to take cognizance of unlawful conduct of his assistant district attorneys in connection with the performance by them of official duties as such assistant district attorneys; whether he has corruptly participated in or acquiesced to the presentation to the court in trial of cases in the southern district of New York of alleged evidence which he knew to be untrue and manufactured, or in the manufacture of and attempt to manufacture such alleged evidence; whether he has produced willful injury and wrong to litigants in said district court and to citizens of the United States by his unlawful and improper conduct; whether he has been guilty of any misbehavior for which he should be impeached.

"And in making this investigation the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer, and is also authorized to appoint a subcommittee to act for and on behalf of the whole committee whenever and wherever it may be deemed advisable to take testimony for the use of said committee. The said subcommittee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee or subcommittee and shall attend the sitting of the same as ordered and directed thereby. The Speaker shall have authority to sign and the Clerk to attest subpœnas for any witness or witnesses."

This resolution (afterwards numbered 90) was on the same day referred by the House to the Committee on the Judiciary.

4. On the 27th day of January, 1916, the House passed H. Res. 110, which is as follows:

[House resolution 110, Sixty-fourth Congress, first session.]

Resolved, That the Committee on the Judiciary in continuing their consideration of H. Res. 90 be authorized and empowered to send for persons and papers, to subpœna witnesses, to administer oaths to such witnesses, and take their testimony.

The said committee is also authorized to appoint a subcommittee to act for and on behalf of the whole committee wherever it may be deemed advisable to take testimony for said committee. In case such subcommittee is appointed it shall have the same powers in respect to obtaining testimony as are herein given to the Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall attend the sittings of such subcommittee and serve the process of same.

In case the Committee on the Judiciary or a subcommittee thereof deems it necessary it may employ such clerks and stenographers as are required to carry out the authority given in this resolution, and the expenses so incurred shall be paid out of the contingent fund of the House.

The Speaker of the House of Representatives shall have authority to sign, and the Clerk thereof to attest, subpœnas for witnesses, and the Sergeant at Arms or a deputy shall serve them.

5. That Representatives Carlin, Gard, and Nelson were appointed by the Judiciary Committee of the House a subcommittee to hear and report under the House resolution the facts as to the impeachment charges heretofore mentioned against H. Snowden Marshall, United States district attorney for the southern district of New York.

6. That while said committee were hearing testimony in New York City as to the truth of said charges in accordance with the resolution and pursuant to authority given to them, that H. Snowden Marshall, the person against whom said impeachment proceeding was pending, without just cause published in the New York Times, a daily paper issued in the city of New York, and thereafter delivered to said subcommittee aforementioned the following letter:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 4, 1916.

SIR: Yesterday afternoon, as I am informed, your honorable committee ordered the arrest of Mr. L. R. Holme, a representative of a newspaper which had published an article at which you took offense. The unfortunate gentleman of the press was placed in custody under your orders. He was taken to the United States marshal to be placed in confinement (I do not understand whether his sentence was to be one day or a dozen years). The marshal very properly declined to receive the prisoner. This left you at a loss, and I am advised that you tried to work your way out of the awkward situation by having Mr. Holme brought back and telling him that you were disposed to be "kind" to him and then discharged him for the purpose of avoiding unpleasant consequences to yourselves.

You are exploiting charges against me of oppressive conduct toward a member of your honorable body who is charged with a violation of law and of oppressive conduct on my part toward shysters in the blackmailing and bankruptcy business.

I may be able to lighten your labors by offering to resign if you can indicate anything I ever did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.

The supposed justification of your order that Mr. Holme be placed in custody was his refusal to answer the question you asked as to where he got the information on which was based the article which displeased you.

It is not necessary for you to place anyone under arrest in order to get the answers to the question which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which he published and from which he made deductions, so that if your honorable committee has a grievance it is against me and not against him.

What I told him was about as follows:

I said that your expedition to this town was not an investigation conducted in good faith, but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

I said that your whole proceeding here was irregular and extraordinary; that I had never heard of such conduct of an impeachment proceeding; that charges of this sort were not usually heard in public until the House of Representatives had considered them and were willing to stand back of them.

I pointed out to him that you, contrary to usual practice, had come here and had held public hearings; that among your witnesses you had invited every rogue that you could lay your hands on to come before you and blackguard and slander me and my assistants under the full privilege of testifying before a congressional committee.

I told him that you had called one of my junior assistants before you and had attempted to make it publicly appear that his refusal to answer your questions as to what occurred in the grand jury room in the Buchanan case was due solely to my orders. I said that at the time you attempted to convey this public impression you knew that it was misleading because I had been asked by you to produce the minutes of the grand jury and had been instructed by the Attorney General not to comply with your request, as you well knew. I showed him the telegram of the Attorney General to me and showed him a copy of my letter to you, dated February 29, 1916, in which I sent you a copy of the telegram of the Attorney General instructing me not to give you the grand jury minutes.

I told him that you were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh and David Slade, in constant conference with you. I said that I believed that every word of the evidence, whether in so-called secret sessions or not, had been placed at the disposal of these worthies, and that I would be just as willing to give the grand jury minutes to a defendant as to give them to your honorable subcommittee.

I told him that I did not share the views which seemed to prevail in your subcommittee on this subject. I said that I regarded a Member of Congress who would take money for an unlawful purpose from any foreign agent as a traitor, and that it was a great pity that such a person could only be indicted under the Sherman law, which carries only one year in jail as punishment.

I said that it was incomprehensible to me how your honorable subcommittee should rush to the assistance of an indicted defendant; how you had apparently resolved to prevent prosecution by causing the district attorney in charge to be publicly slandered.

I told him that I would not permit the prosecution of the persons whose cause you had apparently espoused to be impeded by you; I said that if you wanted the minutes of the grand jury in any case, you would not get them as long as I remained in office.

You will observe from the foregoing statement that what Mr. Holme published may have been based on what I said. If you have any quarrel, it is with me and not with him.

It is amazing to me to think that you supposed that I did not understand what you have been attempting to do during your visit here. I realized that your effort was to ruin me and my office by publishing with your full approval the complaints of various persons who have run afoul of the criminal law under my administration. Your subcommittee has endeavored by insulting questions to my assistants and others, by giving publicity and countenance to the charges of rascals, and by refusing to listen to the truth and refusing to examine public records to which your attention was directed to publicly disgrace me and my office.

I propose to make this letter public.

Respectfully,

H. SNOWDEN MARSHALL,
United States Attorney.

Hon. C. C. CARLIN,
Chairman Subcommittee of the Judiciary Committee
of the House of Representatives,
323 Federal Building, New York, N. Y.

7. That on March 10, 1916, the said H. Snowden Marshall published, in reference to the said subcommittee heretofore named, the following letter:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 10, 1916.

DEAR SIR: Referring to my letter of March 4, addressed to the chairman of the subcommittee which has recently taken testimony in New York concerning my administration of my office, I notice from the press that some persons appear to have construed my statements as directed toward your honorable committee as a whole. I beg to advise you that the criticisms in that letter were addressed to the methods pursued by the subcommittee. I do not retract nor modify any of those criticisms. But I did not intend (nor do I think my letter should be so construed) to reflect in any way upon the Judiciary Committee, nor did I question the power of the House of Representatives to order such an investigation.

If you and the other members of your committee, for whom I have high respect, have gained the impression that my letter carried any personal reflection upon your honorable committee, it gives me pleasure to assure you that I had no such purpose.

Respectfully,

H. SNOWDEN MARSHALL.

HON. EDWIN Y. WEBB,
Chairman of the Judiciary Committee,
House of Representatives, Washington, D. C.

These are the material facts in the case.

8. We conclude and find that the aforesaid letter written and published by said H. Snowden Marshall to Hon. C. C. Carlin, chairman of the subcommittee of the Judiciary Committee of the House of Representatives, on March 4, 1916 (and copied herein in finding of fact No. 6; also in Report No. 494 copied herein), is as a whole and in several of the separate sentences defamatory and insulting and tends to bring the House into public contempt and ridicule, and that the said H. Snowden Marshall, by writing and publishing the same, is guilty of contempt of the House of Representatives of the United States because of the violation of its privileges, its honor and its dignity.

9. We find that Mr. Marshall's testimony is an aggravation of his contempt.

COMMENT ON LAW AND FACTS.

Mr. Marshall denies any intention to insult or stand in contempt of the Judiciary Committee or the House of Representatives, but he practically concedes in his testimony his contempt for the subcommittee and his desire by these publications to bring the subcommittee into ridicule and disrepute. If this is not wholly conceded by him in his testimony, it is certainly very fully proven. He reaffirms in his testimony the views heretofore expressed by him in the letters referred to against the subcommittee, and declines to offer any apology or retraction of the offensive matter in the letters contained, but rather reiterates and reaffirms it and thereby aggravates his contempt. In our opinion it is immaterial to the determination of this case whether the defendants Buchanan and others are guilty, as charged in the indictment in the district court of New York, or not, or whether the impeachment charges against H. Snowden Marshall are true or not. Both may be guilty or both may be innocent or one guilty and the other innocent, with effect on the findings in this case. Therefore the select committee has made no investigation nor does it express any opinion as to the merits of either of said

cases. We are considering under the resolution whether or not the facts herein set forth constitute a contempt by a violation of the privileges of the House of Representatives on the part of H. Snowden Marshall. No legislative body consisting of a large number of members can move from one place to another to take testimony in cases where its power and authority or dignity is called into question. Its power in this respect must, therefore, necessarily be delegated to one of its committees or a subcommittee by a proper resolution, as was done in this case. This delegation of power to a subcommittee is lawful, and carries with it all of the authority belonging to the House in the execution of the immediate purpose for which the committee was called into existence.

Any conduct that would be a violation of the privileges of the House if directed against the House in the first place, would be a contempt against the House and a breach of its privileges when directed against one of its committees or subcommittees appointed by authority of the House to do a specific thing and acting within its delegated power and in the scope of its authority. Any other view would leave the House powerless to protect its honor and dignity and its constitutional rights. It would set at defiance the sovereignty of the people represented by the House. That the House as a representative body has the inherent power to protect itself from defamation and all slanderous and lawless conduct that would bring it into reproach and popular contempt, whether uttered or committed in the presence of the House or elsewhere, has not been disputed since the case of Anderson *v.* Dunn (6 Wheaton, 204). Offensive, abusive, and defamatory language against a committee of the House acting within its authority is offensive, abusive, and defamatory against the House, and is just as dangerous to the integrity of that body as if it had been committed in its presence.

Mr. Justice Johnson in delivering the opinion in the case referred to, Anderson *v.* Dunn, among other things said:

> It is certainly true that there is no power given by the Constitution to either House to punish for contempts, except when committed by their own Members. Nor does the judicial or criminal power given to the United States, in any part, expressly extend to the infliction of punishment for contempt of either house, or any one coordinate branch of the Government. Shall we, therefore, decide that no such power exists? * * * But if there is one maxim that necessarily rides over all others, it is that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers. * * * That "the safety of the people is the supreme law," not only comports with but is indispensable to the exercise of those powers in their public functionaries, without which that safety can not be guarded. On this principle it is that courts of justice are universally acknowledged to be vested by their very creation with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.
>
> It is true that the courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow from this circumstance that they would not have exercised that power without the aid of the statute or not, in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution or a legislative declaration

that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.

But it is contended that if this power in the House of Representatives is to be asserted on the plea of necessity, the ground is too broad and the result too indefi[illegible]; that the executive and every coordinate and even subordinate branch of the Government may resort to the same justification, and the whole assume to themselves, in the exercise of this power, the most tyrannical licentiousness. This is unquestionably an evil to be guarded against, and if the doctrine may be pushed to that extent it must be a bad doctrine, and is justly denounced.

But what is the alternative? The argument obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great Nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested. And, accordingly, to avoid the pressure of these considerations, it has been argued that the right of the respective Houses to exclude from their presence, and their absolute control within their own walls, carry with them the right to punish contempts committed in their presence; while the absolute legislative power given to Congress within this District enables them to provide by law against all other insults against which there is any necessity for providing.

It is to be observed that, so far as the issue of this cause is implicated, this argument yields all right of the plaintiff in error to a decision in his favor; for, nonconstat, from the pleadings, but that this warrant issued for an offense committed in the immediate presence of the House.

Nor is it immaterial to notice what difficulties the negation of this right in the House of Representatives draws after it, when it is considered that the concession of the power, if exercised within their walls, relinquishes the great grounds of the argument, to wit, the want of an express grant, and the unrestricted and undefined nature of the power here set up. For why should the House be at liberty to exercise an ungranted, an unlimited, and undefined power within their walls, any more than without them? If the analogy with individual right and power be resorted to, it will reach no further than to exclusion, and it requires no exuberance of imagination to exhibit the ridiculous consequences which might result from such a restriction, imposed upon the conduct of a deliberative assembly.

In Nugent *v.* Beale (Smith's Digest of Decisions and Precedents, 601), the court says:

The jurisdiction of the Senate in cases of contempt of its authority depends upon the same ground and reasons upon which the acknowledged jurisdiction of other judicial tribunals rests, to wit, the necessity of such jurisdiction to enable the Senate to exercise its high constitutional functions—a necessity at least equal to that which supports the like jurisdiction which has been exercised by all judicial tribunals and legislative assemblies in this country from its first settlement, and in England from time immemorial.

In Hinds' Precedents of the House of Representatives, volume 2, under the heading of Power to Punish for Contempt, pages 1046 to 1142, may be found the digest of the decisions sustaining the power of the House to determine what is contempt and to punish for the same. These decisions are made by the House and by the Senate and the Supreme Court of the United States. Reference is made also to Rawle on the Constitution, page 48, and Story on the Constitution, volume 1, section 847.

We find, therefore, that the House has full power to punish for contempt committed in its presence or not within its presence, by pub-

lication of matter that is defamatory against it or its committee lawfully constituted and acting within its authority. We find as stated that the privileges of the House in this case were breached by H. Snowden Marshall by the letter which he wrote to the subcommittee, heretofore referred to, and copied in Report No. 494 herein contained. This letter as a whole is insulting, defamatory, and a clear expression of contempt. The purpose for which it was written and printed was to defame—to bring into ridicule and contempt—the subcommittee of the Judiciary Committee having under investigation the impeachment charges against H. Snowden Marshall. It was as much as violation of the privileges of the House to have directed a scurrilous and offensive letter of this character against one of its committees as if it had been addressed directly to the House.

It is proper for us to say that Mr. Marshall was given every opportunity to retract or apologize or in some way modify his statements contained in the letter. Parts of the letter containing the most defamatory matter were read to him, and he was asked if he meant to still say that that was true. He reaffirmed and reasserted the same, only with the statement that it was intended to criticize the procedure of the subcommittee and was not intended as a contempt of the House. It is clear that if the House could tolerate such a construction of this letter and could tolerate such vile and defamatory language against one of its committees, it would be powerless to conduct impeachment trials or perform any other duty without living under the disgrace of the contempt that would necessarily come to a body so unmindful of its duties to the people as to permit such insult and injury.

SUMMARY.

Article II, section 4, of the Constitution says:

> The President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

A United States district attorney is a civil officer within the meaning of this section of the Constitution. (See Rawle on Constitution, 213; 1 Story on Constitution, 790; Bouvier Dictionary, p. 319 of vol. 1.)

The impeachment of a civil officer must be by the House of Representatives. (United States Constitution, Article I, section 2.) Impeachments are judicial in their nature.

The committee or subcommittee of the House appointed to investigate the facts under an impeachment proceeding pending in the House, and proceeding within the scope of their authority to perform this duty in taking testimony, is acting for and in place of the House.

A contempt by word, act, publication, or otherwise of a committee having jurisdiction in such cases and acting within the same is a contempt of the House which appointed it, and may be punished as such.

In this case Mr. Marshall was and is a United States district attorney. He was impeached in conformity to the Constitution.

The subcommittee was appointed and had jurisdiction in the matter to make the inquiry it was engaged in.

Mr. Marshall's letter of March 4, 1916, heretofore referred to is defamatory and tends to bring the committee and House into contempt and ridicule. By the printing and publication of the same Mr. Marshall violated the privileges of the House, was guilty of contempt, and is guilty of contempt of the House of Representatives until he purges himself thereof or is purged by punishment.

The power of the House to punish for contempt is not confined to a reprimand. Punishment may be inflicted in the discretion of the House for a period not longer than the duration of the Congress acting.

As to the method of procedure that should be followed in the House in trial of the said H. Snowden Marshall for the contempt which the committee finds that he has committed, we recommend the passage of the following resolution:

Resolved, That the Speaker do issue his warrant, directed to the Sergeant at Arms, commanding him to take in custody, wherever to be found, the body of H. Snowden Marshall, of the State of New York, and to proceed forthwith to bring the said H. Snowden Marshall to the bar of the House of Representatives, to answer the charge that he, on March 4, 1916, in the city of New York, did violate the privileges of the House of Representatives of the United States by writing and causing to be published the following letter:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 4, 1916.

SIR: Yesterday afternoon, as I am informed, your honorable committee ordered the arrest of Mr. L. R. Holme, a representative of a newspaper which had published an article at which you took offense. The unfortunate gentleman of the press was placed in custody under your orders. He was taken to the United States marshal to be placed in confinement (I do not understand whether his sentence was to be one day or a dozen years). The marshal very properly declined to receive the prisoner. This left you at a loss, and I am advised that you tried to work your way out of the awkward situation by having Mr. Holme brought back and telling him that you were disposed to be "kind" to him and then discharged him for the purpose of avoiding unpleasant consequences to yourselves.

You are exploiting charges against me of oppressive conduct toward a member of your honorable body who is charged with a violation of law and of oppressive conduct on my part toward shysters in the blackmailing and bankruptcy business.

I may be able to lighten your labors by offering to resign if you can indicate anything I ever did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.

The supposed justification of your order that Mr. Holme be placed in custody was his refusal to answer the question you asked as to where he got the information on which was based the article which displeased you.

It is not necessary for you to place anyone under arrest in order to get the answers to the question which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which he published and from which he made deductions, so that if your honorable committee has a grievance it is against me and not against him.

What I told him was about as follows:

I said that your expedition to this town was not an investigation conducted in good faith, but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

I said that your whole proceeding here was irregular and extraordinary; that I had never heard of such conduct of an impeachment proceeding; that charges of this sort were not usually heard in public until the House of Representatives had considered them and were willing to stand back of them.

I pointed out to him that you, contrary to usual practice, had come here and had held public hearings; that among your witnesses you had invited every rogue that you could lay your hands on to come before you and blackguard and slander me and my assistants under the full privilege of testifying before a congressional committee.

I told him that you had called one of my junior assistants before you and had attempted to make it publicly appear that his refusal to answer your questions as to what occurred in the grand jury room in the Buchanan case was due solely to my orders. I said that at the time you attempted to convey this public impression you knew that it was misleading because I had been asked by you to produce the minutes of the grand jury and had been instructed by the Attorney General not to comply with your request, as you well knew. I showed him the telegram of the Attorney General to me and showed him a copy of my letter to you, dated February 29, 1916, in which I sent you a copy of the telegram of the Attorney General instructing me not to give you the grand jury minutes.

I told him that you were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh and David Slade, in constant conference with you. I said that I believed that every word of the evidence, whether in so-called secret sessions or not, had been placed at the disposal of these worthies, and that I would be just as willing to give the grand jury minutes to a defendant as to give them to your honorable subcommittee.

I told him that I did not share the views which seemed to prevail in your subcommittee on this subject. I said that I regarded a Member of Congress who would take money for an unlawful purpose from any foreign agent as a traitor, and that it was a great pity that such a person could only be indicted under the Sherman law, which carries only one year in jail as punishment.

I said that it was incomprehensible to me how your honorable subcommittee should rush to the assistance of an indicted defendant; how you had apparently resolved to prevent prosecution by causing the district attorney in charge to be publicly slandered.

I told him that I would not permit the prosecution of the persons whose cause you had apparently espoused to be impeded by you; I said that if you wanted the minutes of the grand jury in any case, you would not get them as long as I remained in office.

You will observe from the foregoing statement that what Mr. Holme published may have been based on what I said. If you have any quarrel, it is with me, and not with him.

It is amazing to me to think that you supposed that I did not understand what you have been attempting to do during your visit here. I realized that your effort was to ruin me and my office by publishing with your full approval the complaints of various persons who have run afoul of the criminal law under my administration. Your subcommittee has endeavored by insulting questions to my assistants and others, by giving publicity and countenance to the charges of rascals and by refusing to listen to the truth and refusing to examine public records to which your attention was directed, to publicly disgrace me and my office.

I propose to make this letter public.

Respectfully,

H. SNOWDEN MARSHALL,
United States Attorney.

Hon. C. C. CARLIN,
Chairman Subcommittee of the Judiciary Committee
of the House of Representatives,
323 Federal Building, New York, N. Y.

That the said H. Snowden Marshall, in writing and publishing said letter, was guilty of a breach of the privileges and a contempt of the House of Representatives, and that the said H. Snowden Marshall be furnished with a copy of this resolution, and a copy of the report of the select committee of the House of Representatives, appointed to investigate the charges made against him in the House of Representatives.

Resolved, That when H. Snowden Marshall shall be brought to the bar of the House, to answer the charge of having violated the privileges of the House of Representatives, as afore set out, the Speaker shall then cause to be read to said H. Snowden Marshall the findings of fact and findings of law by the special committee of the House, charged with the duty of investigating whether or not the

said H. Snowden Marshall had violated the privileges of the House of Representatives, or was in contempt of same; the Speaker shall then inquire of said H. Snowden Marshall if he desires to be heard, and to have counsel on the charge of being in contempt of the House of Representatives for having violated its privileges. If the said H. Snowden Marshall desires to avail himself of either of these privileges, the same shall be granted him. If not, the House shall thereupon proceed to take order in the matter.

JOHN A. MOON.
JOHN N. GARNER.
CHARLES R. CRISP.
JOHN A. STERLING.
I. L. LENROOT.

APPENDIX.

BEFORE A SPECIAL COMMITTEE OF THE HOUSE OF REPRESENTATIVES TO CONSIDER THE REPORT FROM THE JUDICIARY COMMITTEE WITH REFERENCE TO CERTAIN CONDUCT OF H. SNOWDEN MARSHALL.

HOUSE OF REPRESENTATIVES,
Washington, D. C., Friday, April 7, 1916.

The special committee met at 10 o'clock a. m., Hon. John A. Moon presiding.

Present: Representatives Garner, Crisp, Lenroot, and Sterling.

The CHAIRMAN. The committee will come to order. The stenographer will insert in the record at this point Report No. 494 as to alleged official misconduct of H. Snowden Marshall; also H. R. 193.

[House Report No. 494. Sixty-fourth Congress, first session.]

By direction of the Committee on the Judiciary, I beg leave to make the following report, in the nature of a statement, to the House of Representatives. On the 12th day of January, 1916, Hon. Frank Buchanan, a Representative in Congress from the State of Illinois, arose, in his responsible position, on the floor of the House and impeached H. Snowden Marshall, district attorney for the southern district of the State of New York, charging the said H. Snowden Marshall with numerous malfeasances and misfeasances and with corrupt and improper behavior and conduct in office. Immediately after the reading of said charges, Representative Buchanan offered for the immediate consideration of the House resolution 90, which provided, among other things, "that the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of H. Snowden Marshall," etc. After debate on the resolution, the House, upon motion of Mr. Fitzgerald, of New York, referred the resolution to the Committee on the Judiciary for its consideration and action.

The Committee on the Judiciary immediately began the consideration of said resolution and called Representative Buchanan before it to make such statement and furnish such information concerning the truth of his impeachment charges, as set out in House resolution 90, as he was able to make and furnish. Thereafter, on the 27th day of January, 1916, by direction of the Judiciary Committee, the chairman thereof offered in the House of Representatives the following resolution:

[House resolution 110.]

"*Resolved*, That the Committee on the Judiciary in continuing their consideration of House resolution 90 be authorized and empowered to send for persons and papers, to subpœna witnesses, to administer oaths to such witnesses, and take their testimony.

"The said committee is also authorized to appoint a subcommittee to act for and on behalf of the whole committee wherever it may be deemed advisable to take testimony for said committee. In case such subcommittee is appointed, it shall have the same powers in respect to obtaining testimony as are herein given to the Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall attend the sittings of such subcommittee and serve the process of same.

"In case the Committee on the Judiciary or a subcommittee thereof deems it necessary it may employ such clerks and stenographers as are required to carry out the authority given in this resolution, and the expenses so incurred shall be paid out of the contingent fund of the House.

"The Speaker of the House of Representatives shall have authority to sign, and the clerk thereof to attest, subpœnas for witnesses, and the Sergeant at Arms or a deputy shall serve them."

The said resolution was on said date unanimously agreed to.

While further considering the said House resolution 90 and the said House resolution 110, on the 31st day of January, 1916, the Committee on the Judiciary authorized the chairman to appoint a subcommittee of three to execute the purposes of House resolution 110 to act for and on behalf of the full committee wherever it may be deemed advisable to take testimony for said committee, and on February 1, 1916, the chairman appointed Messrs. Charles C. Carlin, Warren Gard, and John M. Nelson as members of such subcommittee.

Thereafter the said subcommittee organized and heard the testimony of certain witnesses in the Judiciary Committee rooms in the city of Washington. The subcommittee determined, for its further information and in carrying out the duties assigned it under the resolution of the House of Representatives, that it should hear the testimony of certain other witnesses in the city of New York, and on the 28th day of February, 1916, the said subcommittee, under subpœnas duly signed by the Speaker of the House of Representatives and attested by the clerk thereof, caused certain witnesses to be brought before it, in the Federal post-office building in the city of New York, and continued the examination of witnesses upon said charges up to and including the 4th day of March, 1916.

On the 3d day of March, 1916, there appeared in a New York newspaper an article containing, among other things, the following language:

"It is the belief in the district attorney's office that the real aim of the Congress investigation is to put a stop to the criminal investigation of the pro-German partisans."

On the 3d of March, 1916, the subcommittee called before it one, Leonard R. Holme, who testified to the subcommittee that he wrote the article containing the foregoing language, but when asked whether or not he conferred with anybody in the district attorney's office before the article was written replied that he declined to give the source of his information. The chairman of the subcommittee then propounded this question to the witness, "Did you confer with Mr. Marshall before you wrote this article?" To which the witness replied, "I respectfully decline to answer the question, sir." The chairman of the subcommittee then propuonded the following question to him, "Did you confer with anybody in Mr. Marshall's office?" To which the witness replied, "I respectfully decline to answer that question, sir."

Whereupon, the sergeant at arms was directed by the chairman of the subcommittee to take charge of the witness and keep him in custody until the further order of the committee. At 4.10 o'clock p. m. of the same day, the chairman of the subcommittee again propounded the foregoing questions to Witness Holme, and the following proceedings were had:

"Mr. CARLIN. Mr. Holme, the committee has directed me to order you to answer question which was asked you. Mr. Stenographer, read the testimony of Mr. Holme.

"(The entire previous testimony of Mr. Holme was read to the committee by the stenographer in the hearing of the committee only.)

"Mr. CARLIN. Mr. Holme, I hand you this article in the sixth column of page 4 of the New York Times, dated Friday, March 3, 1916. The article is headed 'Marshall refuses Buchanan evidence.' I now call your attention to this paragraph of the article:

"'It is the belief in the district attorney's office that the real aim of the Congress investigation is to put a stop to the criminal investigation of the pro-German partisans.'

"I ask you from whom you got that information?

"Mr. HOLME. That information, sir, is a deduction. I have known at the time these proceedings were begun in Washington, it was before the indictment of Congressman Buchanan, that there had been a considerable amount of talk around this building as to their nature. I am down here practically every day of my life, and I meet with a great many men who are connected with the district attorney's office and who are in this building in various other regular capacities, and I based that paragraph entirely upon my knowledge of the general gossip around the building and the general feeling in the building.

"Mr. CARLIN. Why did you not state that, instead of saying it is the belief in the district attorney's office?

"Mr. HOLME. Well, sir, it comes to much the same thing, does it not? The district attorney's office is a large organization.

"Mr. CARLIN. Is that your answer?

"Mr. HOLME. Yes, sir.

"Mr. CARLIN. Did you base that part of the article upon a conference held with H. Snowden Marshall or any subordinate of his in the district attorney's office?

"Mr. HOLME. I based that article on my general knowledge of the conditions surrounding this proceeding and the general opinion floating around the building.

"Mr. CARLIN. You state that it is the general belief in the district attorney's office. Now, who in the district attorney's office expressed that belief?

"Mr. HOLME. I don't think I could give you any definite names, because I have discussed this matter with a large number of different people at various times.

"Mr. CARLIN. As a matter of fact, did anybody in the district attorney's office express that belief?

"Mr. HOLME. Yes, sir.

"Mr. CARLIN. Who?

"Mr. HOLME. I can only remember a very few, and I respectfully decline, as a newspaper man, to express their opinions, which are often given to me in general conversation.

"Mr. CARLIN. Was the belief expressed by Mr. Marshall or either of his assistants?

"Mr. HOLME. I respectfully decline to answer, sir.

"Mr. CARLIN. Mr. Stenographer, insert in the record this article which I hand you, and the date line of the paper.

"Mr. GARD. I understand you to say, Mr. Holme, that this extract which has been read to you was written by you?

"Mr. HOLME. Yes, sir.

"Mr. GARD. And the extract is this:

"'It is the belief of the district attorney's office that the real aim of the congressional investigation is to put a stop to the criminal investigation of the pro-German partisans.'

"You wrote that?

"Mr. HOLME. Yes, sir.

"Mr. GARD. And I understand also that you decline and refuse to answer questions as to whether you obtained that information from anyone in the district attorney's office of the southern district of New York?

"Mr. HOLME. Yes, sir.

"Mr. GARD. You decline to answer that?

"Mr. HOLME. Yes, sir.

"Mr. CARLIN. Now, then, Mr. Holme, I am directed by the committee to order you to answer that. Do you still decline?

"Mr. HOLME. I do, respectfully, sir.

"Mr. CARLIN. Then, I am directed to say to you, for the record, that this committee determines you to be in contempt of the order of the committee and of the House of Representatives of the Congress of the United States, and that for the present you will be released from the custody of the marshal until the committee, if it sees proper, shall proceed in the manner prescribed by statute in such cases. We want to be kind to you. We have no desire to be harsh with you. We realize to some extent your embarrassment. We have a duty to discharge, and we think under the circumstances we will discharge it in this way and release you from the custody of the Sergeant at Arms of the House."

On Saturday, the 4th day of March, 1916, the said H. Snowden Marshall, as district attorney for the southern district of New York, caused to be transmitted to C. C. Carlin, chairman of said subcommittee, then in the performance of its duties, as required by the House of Representatives, the following letter:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 4, 1916.

SIR: Yesterday afternoon, as I am informed, your honorable committee ordered the arrest of Mr. L. R. Holme, a representative of a newspaper which had published an article at which you took offense. The unfortunate gentleman of the press was placed in custody under your orders. He was taken to the United States marshal to be placed in confinement (I do not understand whether his sentence was to be one day or a dozen years). The marshal very properly declined to receive the prisoner. This left you at a loss, and I am advised that you tried to work your way out of the awkward situation by having Mr. Holme brought back and telling him that you were disposed to be "kind" to him and then discharged him for the purpose of avoiding unpleasant consequences to yourselves.

You are exploiting charges against me of oppressive conduct toward a member of your honorable body who is charged with a violation of law and of oppressive conduct on my part toward shysters in the blackmailing and bankruptcy business.

I may be able to lighten your labors by offering to resign if you can indicate anything I ever did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.

The supposed justification of your order that Mr. Holme be placed in custody was his refusal to answer the question you asked as to where he got the information on which was based the article which displeased you.

It is not necessary for you to place anyone under arrest in order to get the answers to the question which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which he published and from which he made deductions, so that if your honorable committee has a grievance it is against me and not against him.

What I told him was about as follows:

I said that your expedition to this town was not an investigation conducted in good faith, but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

I said that your whole proceeding here was irregular and extraordinary; that I had never heard of such conduct of an impeachment proceeding; that charges of this sort were not usually heard in public until the House of Representatives had considered them and were willing to stand back of them.

I pointed out to him that you, contrary to usual practice, had come here and had held public hearings; that among your witnesses you had invited every rogue that you could lay your hands on to come before you and blackguard and slander me and my assistant under the full privilege of testifying before a congressional committee.

I told him that you had called one of my junior assistants before you and had attempted to make it publicly appear that his refusal to answer your questions as to what occurred in the grand jury room in the Buchanan case was due solely to my orders. I said that at the time you attempted to convey this public impression you knew that it was misleading because I had been asked by you to produce the minutes of the grand jury and had been instructed by the Attorney General not to comply with your request, as you well knew. I showed him the telegram of the Attorney General to me and showed him a copy of my letter to you, dated February 29, 1916, in which I sent you a copy of the telegram of the Attorney General instructing me not to give you the grand jury minutes.

I told him that you were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh and David Slade, in constant conference with you. I said that I believed that every word of the evidence, whether in so-called secret sessions or not, had been placed at the disposal of these worthies, and that I would be just as willing to give the grand jury minutes to a defendant as to give them to your honorable subcommittee.

I told him that I did not share the views which seemed to prevail in your subcommittee on this subject. I said that I regarded a Member of Congress who would take money for an unlawful purpose from any foreign agent as a traitor, and that it was a great pity that such a person could only be indicted under the Sherman law, which carries only one year in jail as punishment.

I said that it was incomprehensible to me how your honorable subcommittee should rush to the assistance of an indicted defendant; how you had apparently resolved to prevent prosecution by causing the district attorney in charge to be publicly slandered.

I told him that I would not permit the prosecution of the persons whose cause you had apparently espoused to be impeded by you; I said that if you wanted the minutes of the grand jury in any case, you would not get them as long as I remained in office.

You will observe from the foregoing statement that what Mr. Holme published may have been based on what I said. If you have any quarrel, it is with me, and not with him.

It is amazing to me to think that you supposed that I did not understand what you have been attempting to do during your visit here. I realized that your effort was to ruin me and my office by publishing with your full approval the complaints of various persons who have run afoul of the criminal law under my administration. Your subcommittee has endeavored by insulting questions to my assistants and others, by giving publicity and countenance to the charges of rascals and by refusing to listen to the truth and refusing to examine public records to which your attention was directed, to publicly disgrace me and my office.

I propose to make this letter public.

Respectfully,

H. SNOWDEN MARSHALL,
United States Attorney.

Hon. C. C. CARLIN,
Chairman Subcommittee of the Judiciary Committee
of the House of Representatives,
323 Federal Building, New York, N. Y.

At the same time or before this letter was sent to the subcommittee, it was given to the newspapers and published by them.

On the 9th day of March, 1916, the subcommittee aforesaid, through its chairman, Hon. C. C. Carlin, submitted to the Committee on the Judiciary the foregoing letter of H. Snowden Marshall.

On or about the 11th day of March, 1916, the following letter was received by the chairman of the Judiciary Committee and immediately laid before the full committee:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 10, 1916.

DEAR SIR: Referring to my letter of March 4, addressed to the chairman of the subcommittee which has recently taken testimony in New York concerning my administration of my office, I notice from the press that some persons appear to have construed my statements as directed toward your honorable committee as a whole. I beg to advise you that the criticisms in that letter were addressed to the methods pursued by the subcommittee. I do not retract nor modify any of those criticisms. But I did not intend (nor do I think my letter should be so construed) to reflect in any way upon the Judiciary Committee, nor did I question the power of the House of Representatives to order such an investigation.

If you and the other members of your committee, for whom I have high respect, have gained the impression that my letter carried any personal reflection upon your honorable committee, it gives me pleasure to assure you that I had no such purpose.

Respectfully,

H. SNOWDEN MARSHALL.

Hon. EDWIN Y. WEBB,
Chairman of the Judiciary Committee, House of Representatives, Washington, D. C.

The Judiciary Committee has carefully considered said letters in the light of congressional and judicial precedents as touching the prerogatives of the House of Representatives and its Members, and the committee has come to the determination that said letters, their publication and attendant circumstances, are of such nature, that they should be called to the attention of the House. For obvious reasons the committee deems it advisable to take this step rather than to report directly upon the facts and the law in the case. I am, therefore, directed by the committee to report the whole matter to the House of Representatives, with the recommendation that a select committee of five be appointed by the Speaker to report upon the facts in this case; the violations, if any, of the privileges of the House or the Committee on the Judiciary or the subcommittee thereof; the power of the House to punish for contempt; and the procedure in contempt proceedings, to the end that the privileges of the House shall be maintained and the rights of the Members protected in the performance of their official duties.

[H. Res. 193. Sixty-fourth Congress, first session.]

Resolved, That a select committee of five members be appointed forthwith by the Speaker to consider the report, in the nature of a statement, from the Judiciary Committee with reference to certain conduct of H. Snowden Marshall, and to report to the House of Representatives the facts in the case; the violations, if any, of the privileges of the House of Representatives or of the Committee on the Judiciary, or of the subcommittee thereof; the power of the House to punish for contempt; and the procedure in contempt proceedings, in case they find a contempt has been committed, to the end that the privileges of the House shall be maintained and the rights of Members protected in the performance of their official duties.

The select committee shall have the power to send for persons and papers and shall submit its report to the House not later than April fourteenth, nineteen hundred and sixteen.

What is the pleasure of the committee? What will you have done first, gentlemen?

Mr. CRISP. There are gentlemen present here from the Judiciary Committee, and I presume they desire to present some of their views to the committee. I think it would be the proper thing to hear from them first.

The CHAIRMAN. We will hear from the chairman of the Judiciary Committee, Mr. Webb.

STATEMENT OF HON. EDWIN Y. WEBB, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA.

Mr. WEBB. Mr. Chairman and gentlemen of the committee, there are a good many angles involved in this matter, but only one or two about which there might be any controversy at all.

As I understand it, the resolution has directed you gentlemen to investigate and report the facts, which happily are almost entirely of record, composed of the two letters which I sent out in the report, written by Mr. Marshall to the chairman of the subcommittee. I therefore take it that it will be easy to report on that under the direction contained in the resolution.

The CHAIRMAN. Have you those letters?

Mr. WEBB. They are copied in the report. The other angle is to say whether or not the letters are in contempt of the House, and if so, what proceeding should be had, and the power of the House to punish for contempt.

On the question of whether or not the letters are contemptuous, I do not think there is any controversy as to that, when you take into consideration the surroundings at the time the letters were written. As you gentlemen know, Mr. Buchanan on the 14th day of January arose in his responsible place in the House and impeached Mr. H. Snowden Marshall for high crimes and misdemenors and set out some 35 or 40 specific charges. Those charges, upon the motion of Mr. Fitzgerald, were referred to the Judiciary Committee for examination and report.

Shortly thereafter, having previously examined Mr. Buchanan and other witnesses, the Judiciary Committee directed the chairman to ask the House for power to subpœna witnesses, swear them, etc., and to make a further investigation of the charges in this resolution. In consequence thereof, H. R. 110 was unanimously passed by the House which gave the Judiciary Committee or any subcommittee thereof the power to further investigate the charges as set out in this resolution, and gave them power to subpœna witnesses and swear them and take testimony, either here in Washington or at any other place that the Judiciary Committee might deem proper to have the evidence taken—the regular power given committees in all impeachment matters, I may say.

The Judiciary Committee immediately thereafter authorized the chairman of the Judiciary Committee to appoint a subcommittee of three to take this testimony, which was done, I think, on or about the 27th of February. That committee consisted of Mr. Carlin, Mr. Gard, and Mr. Nelson. Immediately thereafter they began their duties as directed by the House. They sat for a week or 10 days here in Washington and subpœnaed a number of witnesses, Judge Maher, United States judge from the southern district of New York, was one of the witnesses, and a number of other men of distinction were brought before the subcommittee and examined.

There were numerous witnesses whose names were furnished to the subcommittee who lived in New York, and the subcommittee thought, as a matter of economy and expedition, that it would be better to go to New York, nearer to the witnesses, in order to hasten

the hearing. Consequently they determined to go to New York, and did go there on the 28th day of February, and opened their hearings in the Federal post-office building in New York City, and, after having sat for five or six days—Monday, Tuesday, Wednesday, Thursday, Friday, and Saturday morning—investigating these charges made against Mr. Marshall, subpœnaing, of course, such witnesses as furnished them by the man accused, Mr. Buchanan.

Necessarily, I can say rather parenthetically here, all these investigations in impeachment charges are in the nature of inquisitorial proceedings; they must be in the nature of the case; it is an ex parte hearing, and may some time seem to the public generally to be a little harsh, but it is the only remedy the people have, the only method they have of getting rid of an unworthy officer, or of an officer who has been impeached by a Member of Congress in his responsible position.

These gentlemen had sat there all the week and the testimony is printed, and if you gentlemen want to go through it, it is at your disposal. On Monday morning there appeared in a newspaper in New York—in the New York Times—an article which, among other things, had this language in it:

It is the belief in the district-attorney's office that the real aim of the congressional investigation is to put a stop to the criminal investigation of the pro-German partisans.

Mr. STERLING. Is the substance of that article the same as this first letter that Marshall wrote to the committee? He states in that letter that what he claims to have stated to the newspaper man is an article along the same line of his letter?

Mr. WEBB. Yes, sir; the general deductions and reference to circulating the grand jury minutes for the subcommittee to see if any testimony was given before the grand jury. As you understand, one of the charges in the impeachment articles was that Mr. Marshall had corruptly procured from the grand jury in New York indictments against reputable citizens upon no testimony, without having any testimony, or sufficient testimony.

Mr. STERLING. Do Mr. Buchanan's charges that he made on the floor of the House along that line refer to the Buchanan and Fowler cases particularly, or do they claim there were other cases?

Mr. WEBB. They claimed there were other cases.

Mr. STERLING. And they did not intend to cover the Buchanan and Fowler cases at all?

Mr. WEBB. They did intend to cover the Buchanan and Fowler cases.

Mr. STERLING. In the charges?

Mr. WEBB. Yes, sir; Mr. Buchanan came before the committee and stated that was one of them, and he covered them generally because he said there were others. I believe some indictments grew out of what was known as the Rae Tanzer case, where other indictments were found without any evidence, or without sufficient evidence.

That article appeared in the New York newspaper, and that article, a section of which I will read, of course appeared to the subcommittee to be unfair and unjust and untrue, and immediately they began to inquire who the author of the article was, and they discovered it was a young man by the name of Holme, I believe, and he, being in the committee room, they called him on the witness stand and asked

him about this article, and they asked him who in the district attorney's office gave him the information. He declined to answer the question. They asked him if he got the information in the district attorney's office. He said, "Yes; that was the general report around the office." After a long series of questions, which are set out in the report, and he still declining to answer the question, the committee told him they would hold him in the custody of the Sergeant at Arms until further orders. At 4 o'clock and 10 minutes that afternoon they called him back on the stand and reasked him the same questions, and he still declined to answer them, declined to say whether Mr. Marshall was the author of this charge, or who it was, and thereupon the committee admonished him and told him they wanted to be kind to him and not harsh and would turn him loose, discharge him until some further steps might be taken under the laws of the United States. You gentlemen know that the Constitution provides that where a witness refuses to answer a question before a congressional investigating committee, he is guilty of contempt and can be indicted by being reported to the district attorney's office in the District of Columbia by the Speaker of the House or by the Vice President of the Senate.

This occurred on Friday afternoon. On Saturday morning this subcommittee continued its investigation by examining some other witnesses. Upon Saturday afternoon, about 6 o'clock, I am informed, the first letter of date March 4 was written to Mr. Carlin.

Mr. CARLIN. About 3 o'clock.

Mr. WEBB. And I am informed by Mr. Carlin that he knew nothing about the letter until the newspapers in New York called him up to know about it. In other words, the letter had been given to the public press in New York before it was even received by the subcommittee of the Judiciary Committee.

The letter speaks for itself, gentlemen. In my opinion, it is unjust, it is slanderous, it is contemptuous.

Mr. MOON. You are speaking of the letter of March 4?

Mr. WEBB. The letter of March 4 that Mr. Marshall wrote the subcommittee.

Mr. MOON. That you presented to the House?

Mr. WEBB. Yes. The letter is undoubtedly contemptuous, and was written and published for the purpose of expressing the contempt of the writer. Every line of it is contemptuous in the most unfair kind of language, and the fact that Mr. Marshall, at the conclusion of the letter, says, "I propose to make this letter public," and before ever letting the chairman of the committee look over it and see it, it was put in the hands of the newspapers and published all over New York for the purpose of bringing disgrace and contumely and shame on a committee sent to New York by the House of Representatives in the pursuance of one of its constitutional functions, to wit, the most powerful constitutional function probably the Congress has—that is, the power of impeachment. The Constitution says distinctly it is one of the few distinct things provided in the Constitution—that is, that the House shall be the sole originators and triers of impeachment cases.

Mr. LENROOT. May I ask you there—we are directed here to find whether a contempt has been committed. I should like to know

your views as to whether or not in making that finding we are required to pass upon what, if any, basis of truth there may be in the charges made in this letter?

Mr. WEBB. Answering you, Mr. Lenroot, it makes no difference to the committee——

Mr. LENROOT (interposing). I merely wished to get your view as to the law.

Mr. WEBB. I do not think it is necessary to find a basis for it, but I should like you to read over the testimony and find there is no basis for it, if you will.

Mr. GARDNER. Was that testimony taken in New York by the subcommittee?

Mr. WEBB. Yes; and we shall be glad to furnish this committee with a copy of the letter. I have read every line of it, and I want to say that I have been in these inquisitions before, and I have realized myself in questioning witnesses that we have gone a little far. We have not been compelled, there is no law which compels an investigating committee of this sort to observe the rules laid down——

Mr. GARDNER (interposing). May I ask a question in connection with the one Mr. Lenroot propounded a moment ago?

Mr. WEBB. Yes, sir; I hope you gentlemen will ask questions.

Mr. GARDNER. Let us suppose, for the sake of the argument, that the statements made in the letter by Mr. Marshall are true; that the subcommittee had done all the things that he intimated they did in his letter. Being an officer of the Government and holding a high position, would he be justified in writing that kind of a letter, admitting the facts stated therein to be true?

Mr. WEBB. I do not think he would, Mr. Gardner, even if everything he said was true, because the manner in which he writes it, the manner in which he made it public, the contemptuous expressions all through show that even though what he states is true, he purposely and deliberately planned to make his letter full of contempt for the purpose of reflecting upon these gentlemen, bringing disgrace upon them, and if possible driving them out of New York.

Mr. MOON. Will you file with the committee, to be printed with this report, the testimony to which you refer?

Mr. WEBB. I will, Mr. Moon; yes, sir.

Mr. Marshall starts out by saying:

> You are exploiting charges against me of oppressive conduct toward a Member of your honorable body who is charged with a violation of law, and of oppressive conduct on my part toward shysters in the blackmailing and bankruptcy business.

Then he takes up this man Holme's trouble. He is the man who becomes offended because Holme was required or asked to tell if he got his information from the district attorney, and the district attorney behind Holme, it seems, was trying to reflect upon the subcommittee, and when the subcommittee questioned him to find out where he was getting his evidence and the newspaper reporter declined to answer, then Mr. Marshall runs to his rescue with this contemptuous letter. He said:

> I may be able to lighten your labors by offering to resign if you can indicate anything I ever did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.

"Lawless tyranny;" there is a man who had published in the newspaper, issued right over the office where these three gentlemen representing the dignity of the House of Representatives were sitting, a charge of slander against them. It was slander.

Mr. LENROOT. Let me ask you right there, is it your view of the law that this subcommittee did have a right to arrest Mr. Holme?

Mr. WEBB. It had the right to detain him in custody, for the present, at least.

Mr. LENROOT. I just wanted to know your view about that.

Mr. STERLING. On that point, Mr. Webb, of course, I have not any doubt but what a committee has the right to detain him in custody; then, I suppose, they should report it to the House, and the House would determine the question as to whether or not the detention should be continued.

Mr. WEBB. I think you are right there, sir.

Mr. STERLING. But at the time Holme refused to answer these questions you were not investigating the charges which Buchanan had made in the House?

Mr. WEBB. That is true, sir.

Mr. STERLING. You think you did have a right into that question and compel witnesses to answer, it being a collateral matter and not of the substance of the investigation?

Mr. WEBB. I will say to you, Judge Sterling, that question has never been decided in the history of this Government. The question never arose before (that particular collateral question), because no committee of the House of Representatives investigating impeachment charges under the highest constitutional prerogative, so far as I know, has ever been assaulted in a manner like this, or ever had occasion to call a man up before them and try to determine from whom he got the insulting information, and especially when the paper stated that it came from the very man whom the subcommittee was investigating.

Mr. LENROOT. Has it been decided that the subcommittee of the House has a right to detain a witness in custody?

Mr. WEBB. No, sir; not that I know of.

Mr. CRISP. In the Kilbourn case, did not the Supreme Court hold that either branch of Congress could deal with a contumacious witness, provided they were authorized to legislate or deal with the matter on which he declined to answer?

Mr. WEBB. That was the point on which the Kilbourn case was decided by Justice Miller. They held, and held only, that in that particular case that the House of Representatives had no authority to appoint a committee to investigate the private matters of a concern, to wit, whether a man held stock in what is known as a real estate pool in the District of Columbia, and consequently his refusal to answer a question and produce books, he was thereafter found in contempt of the House, and incarcerated by the sergeant at arms, was unlawful, the whole business void, and therefore the sergeant at arms liable, but in that very case, they do not say that the House of Representatives has not the inherent power to punish contempt, and especially, as Judge Miller sets out, that whereas his argument may throw some doubt upon the general power of the House to punish for contempt with ordinary representative committees, yet there are certain ques-

tions which they, under the Constitution, specifically are given power to investigate, to wit, election contests. They can punish a Member for improper conduct, and can originate and try impeachment cases.

Mr. STERLING. There are several cases where punishment by the House has been sustained?

Mr. WEBB. Yes, sir; I will cite them.

Mr. STERLING. As to contumacious witnesses, I think in the Kilbourn case, if I remember, the court discharged him because they were trying to investigate a matter over which they did not have jurisdiction?

Mr. WEBB. That is right.

Mr. STERLING. The question arose in my mind as to whether or not this committee, when it had Holme in its investigation, that the article then appeared in the paper after the committee had been appointed was not covered by the committee's commission to investigate.

Mr. WEBB. That is true. That is why I say it is a novel point.

Mr. CRISP. That is why I called attention to the Kilbourn case.

Mr. GARDNER. Judge Sterling, admitting the fact that the subcommittee did not have the right to investigate Mr. Holme or commit him, as it were, would that justify the district attorney in writing the character of letter that he did to the subcommittee?

Mr. STERLING. I will tell you how I feel about that personally. Of course, a man may commit a libel by telling the truth so far as that is concerned, but there is not any use to present a matter to this House; there is no contempt where the libel is the truth. The House would not stand that for a minute.

Mr. WEBB. No; I would not have you do that.

Mr. STERLING. The House would not stand for it, and I think we ought to proceed so we are sure of our ground.

Mr. WEBB. But, gentlemen, leaving out the Holme matter entirely, except as a starting point for Mr. Marshall; leaving out the question of whether or not they had the right to hold him in custody—and by the way, I want to say that the subcommittee never ordered him into the custody of the United States marshal at all; it ordered him to be held by Mr. Gordon, the Sergeant at Arms of the House for a few hours, and later called him on the stand, and then dismissed him. He was in the custody of Mr. Gordon, and they walked around the building together; stayed together, very pleasantly associated together.

He goes on, though, and practically takes up the burden of making this charge against the House of Representatives that this man Holme made in the paper. Now I will leave out Holme entirely.

He says:

> I may be able to lighten your labors by offering to resign if you can indicate anything I ever did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.
>
> The supposed justification of your order that Mr. Holme be placed in custody was his refusal to answer the question you asked as to where he got the information on which was based the article which displeased you.

Now, mark you, that article was in the New York Times saying that this whole congressional investigation—saying that it was the belief of the district attorney's office that the real aim of the congressional

investigation was to put a stop to the criminal investigation of the pro-German partisans.

That was not a reflection upon that subcommittee; and if it were, would be a reflection upon the House of Representatives, because, constructively, when the House of Representatives appointed this committee, the power of the House and the dignity of the House itself went to New York. Manifestly, the House can not sit down and hear three or four weeks of testimony in investigating preliminary impeachment charges, and therefore they assign that power to some responsible subcommittee; and when this committee went to New York it had thrown around it the power and protection of the House of Representatives, as lodged in the House of Representatives by the Constitution of the United States.

Mr. MOON. The resolution of the House authorizes the Judiciary Committee to appoint this subcommittee.

Mr. WEBB. Yes, sir; that is set out in H. R. 110, embodied in the report, Mr. Chairman.

There was a direct and awful reflection upon the House of Representatives, and a reflection which is not true, which every man in the House and on the floor of the House knows is not true. It was made for the purpose of bringing disgrace upon that body, upon the House of Representatives, and upon the subcommittee that dared investigate the charges presented by a Member of the House.

Now, Mr. Marshall says, further:

It is not necessary for you to place anyone under arrest in order to get the answers to the question which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which he published and from which he made deductions, so that if your honorable committee has a grievance it is against me and not against him.

That is the man whose conduct the Congress of the United States has solemnly instructed its subcommittee to investigate.

What I told him was about as follows:

I said that your expedition to this town was not an investigation conducted in good faith.

That was contemptuous.

Your expedition to this town was not an investigation conducted in good faith—

That was a direct charge of bad faith on the part of Congress and of the subcommittee—

but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

One of the body of the House of Representatives.

Gentlemen, that language alone was as contemptuous as a man could possibly write, and especially under the circumstances, and with the determination and announced statement in his letter that he proposed to make such contemptuous language public and says this:

I pointed out to him that you, contrary to usual practice, had come here and had held public hearings—

So far as I know in every investigation for the last 10 or 12 years, all hearings have been held publicly. In the beginning of this investigation had in the Judiciary Committee room, the first witnesses were examined in secret session, and I may say to you gentlemen here it was done because we thought there were some witnesses whose

testimony might not be worthy of credence which the committee ought to give an honorable witness, and that testimony was held behind closed doors, and for the sake of H. Snowden Marshall was never made public, and never has been made public. There was the subcommittee and the Judiciary Committee and the House trying to protect him against witnesses that the committee itself did not have entire confidence in, and he rushes into open print and slanders the committee that has theretofore been trying to protect him. I say that all these investigations heretofore have been held in public, so in the Duane case in Florida, so in the Archibald case, so in the Hanford case, so in the Swan case.

Mr. STERLING. Did we not have any secret hearings in the Archibald case at all?

Mr. WEBB. I do not believe we did.

Mr. STERLING. I do not believe we did after we began taking testimony.

Mr. WEBB. We had an executive session around the table and read documentary evidence, but all of the hearings were public.

Mr. LENROOT. The subcommittee held hearings outside of Washington in the Swan case?

Mr. WEBB. Yes; and in other cases.

Mr. GARDNER. You say these hearings behind closed doors were for the protection of Mr. Marshall?

Mr. WEBB. Absolutely.

Mr. GARDNER. Upon the idea that witnesses might make statements concerning his official conduct that would reflect upon him unjustly?

Mr. WEBB. I think I can say that absolutely for the subcommittee. They were aware that among these 50 or 60 witnesses whose names had been given them, we got the idea that a few of them were not entirely responsible, or that their characters might be impeached, whose character had been impeached by members of the Judiciary Committee sitting around the executive board, and for the purpose of not paralyzing the arm of the district attorney's office in New York by testimony which might be regarded as tainted with improper character, some of these witnesses were examined behind closed doors.

May I say that for the subcommittee? If I am in error I want to be corrected.

(Messrs. Nelson and Gard signified their assent.)

He charges the subcommittee of the House of Representatives with bad faith, and then goes on to say:

> I pointed out to him that you, contrary to usual practice, had come here and had held public hearings; that among your witnesses you had invited every rogue that you could lay your hands on to come before you and blackguard and slander me and my assistants under the full privilege of testifying before a congressional committee.

Having read the testimony, every word of it, as taken by the official stenographer in New York, I deny that charge against the subcommittee. It is not true. It is not true that these gentlemen invited anybody. Mr. Buchanan, on the floor of the House, stated to the House that he was a poor man and could make these charges against Mr. Marshall good if he had the power to get witnesses present, and it has been the custom during all the years of you gentlemen's long and honorable carrier that whenever a Member of Congress im-

peaches any civil officer of the United States that he furnishes the names of the witnesses and the House subpœnas them. This subcommittee simply went up there in obedience to the desire of the House to investigate the charges set out by this man Buchanan and for him to furnish the witnesses to be examined. I believe I have stated that this subcommittee of its own initiative has not subpœnaed any witness?

Mr. NELSON. Do you wish an answer?

Mr. WEBB. Yes, sir.

Mr. NELSON. We have not; no witness not suggested by Mr. Buchanan or who requested to be heard, for instance, Mr. Wise.

Mr. WEBB. I think that should be known to the gentlemen of this special committee. They did not go around hunting up testimony, as they had a right to. If they had wanted to, they could have put men to work and hunted up testimony against this man Marshall. But no; they had contented themselves to subpœna and examine witnesses submitted to them by Congressman Buchanan—excepting in one case there was testimony before the subcommittee in New York about a certain matter, and Hon. Henry A. Wise——

Mr. NELSON. Let me qualify that in this much, that when some evidence was given on some certain charge, where the witness mentioned some particular name, and the chairman wished to corroborate that, he would send for that person mentioned in the testimony.

Mr. WEBB. Yes, sir; that is all right. This committee was sitting there and taking testimony and Mr. Henry A. Wise, the predecessor of Mr. H. Snowden Marshall, a very distinguished lawyer in New York City, as you all know, volunteered to take the stand in behalf of Mr. Marshall, you might say. If you read his testimony you will find it is a most magnificent encomium on Mr. Marshall and Mr. Marshall's administration up there, explaining the grand jury, the use of the grand jury, and the ease indictments might be found, etc., and the committee heard him voluntarily on behalf of Mr. Marshall, and refused to hear nobody that asked to be heard. He says:

> You invited every rogue that you could lay your hands on to come before you and blackguard me.

The subcommittee has informed me that they do not know of a single man that was examined by this subcommittee who has ever been convicted of roguery or of larceny.

I will tell you what they did do, gentlemen. In the Rae Tanzer case, and in that case without discussing the merit of it, I might say that Hon. Martin Milton, at one time a very distinguished Member of this House, known as a great lawyer, stated before the subcommittee here in Washington about 10 days ago that when Mr. Marshall took jurisdiction of the Rae Tanzer case he wrenched the Federal jurisdiction. Mr. Ripton, a witness, Judge Maher, Hon. J. B. Stanchfield were witnesses—some of the highest class men in the United States—and many of them testified gladly to the good character and the high standing of Hon. H. Snowden Marshall.

Mr. STERLING. Were any of the witnesses persons whom Marshall had prosecuted?

Mr. WEBB. Yes, sir; necessarily so. There was a man by the name of Crocker, I believe, a lawyer.

Mr. GARD. Several of them were.

Mr. WEBB. Yes.

Mr. GARD. That was the Oppenheimer case.

Mr. WEBB. It was stated that after indictments had been quashed that the district attorney would go up to the grand jury and get another indictment; sometimes got six or seven, but they had to be investigated. It was charged that he showed that malicious and persistent feeling toward these men not consistent with a good officer. They did have to examine him, of course. But the subcommittee knew he had been indicted and what he was indicted for, and the members of the subcommittee were big enough and broad enough to take into consideration the circumstances and were able to weigh the testimony.

I was going to tell you what was done in the Rae Tanzer case. A man by the name of Stafford, who was indicted for perjury——

Mr. STERLING. What is that case you were speaking of?

Mr. WEBB. I think I will explain it briefly. There was a little woman by the name of Rae Tanzer who was taken to a town in New Jersey and there she was——

Mr. STERLING (interposing). Under the Mann Act?

Mr. WEBB. Not under the Mann Act, but a gentleman, who said his name was Oliver Osborn, spent a night with her and abused her. Later on she wrote letters and she finally got no word from him, and she located James W. Osborn and charged him with being Oliver Osborn, and she went then to consult four or five law firms, and could not get anybody to represent her, and finally got Slade & Slade to represent her, and Slade & Slade brought a civil suit in the civil court of New York for breach of promise, seduction, etc., and while that civil suit was pending in the United States court, under Mr. Marshall's jurisdiction and with Mr. Marshall's consent and helping to arrange it, Hon. James W. Osborn, being then in the employ, I believe, of the United States Government in prosecuting the New Haven Railroad cases, they issued a warrant for the Slades and for Rae Tanzer and for Rae Tanzer's two sisters, and some other witnesses, I believe.

Mr. NELSON. Mr. Stafford?

Mr. WEBB. Mr. Stafford, who was clerk of the hotel, who identified James W. Osborn as being the man who spent the night there.

Mr. NELSON. And the private detective?

Mr. WEBB. Yes. They indicted Slade for conspiracy to obstruct justice in a United States court.

Mr. GARD. It is fair to say that the matter arose in this way: Rae Tanzer, the complaining person in the civil case, was arraigned before Commissioner Holton, United States commissioner, on the specific charge that she had written a letter to James W. Osborn, which they charged was an abuse of the mails, and an attempt to use the mails for the purpose of obtaining money under blackmail and unlawfully defraud. The letter hardly bears such an interpretation, but that was the start of the prosecution.

Mr. WEBB. That was the hook upon which they hung the jurisdiction of the United States.

Mr. GARD. Yes; that was what they hung the jurisdiction of the United States court on. Then all other indictments were returned for conspiracy and perjury and things like that; they put everything in,

and everybody in, the lawyers and her sisters, and everybody else; they indicted them for conspiracy and some for perjury, but that was the original jurisdiction and the writing of the letter.

Mr. WEBB. And during all these indictments, cross indictments, and conspiracy charges lying up there in New York from the United States district attorney's office they indicted the man by the name of Stafford for perjury, and they convicted him.

Now that man Stafford was subpœnaed here as a witness. His name was given to the committee by Mr. Buchanan, and although he had been indicted, there was no reason why he should not testify. But he came down and the committee would not hear him; they said, "We will not swear you; you have been convicted of perjury; you can send a statement or an affidavit down here if you want to." That is how that subcommittee was protecting Mr. H. Snowden Marshall.

Mr. GARD. That was even after this letter was received.

Mr. WEBB. Yes.

Mr. NELSON. On that point let me tell you also for the record that another gentleman came to the committee and asked to be heard and said he had a very severe case of oppression on the part of Mr. Marshall. He was asked if he had been convicted. He admitted he had, and the chairman informed him that we could not hear him; that he might file his statement in the form of an affidavit, and that was done.

Mr. WEBB. So I say his charge against this House and this subcommittee that "they have invited every rogue they could lay their hands on to come before the subcommittee and blackguard and slander me (Marshall)," I say that is untrue.

A little further on he says:

I told him that you were traveling around—

That is another contemptuous remark—

I told him that you (the subcommittee) were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh and David Slade, in constant conference with you. I said that I believed that every word of the evidence, whether in so-called secret sessions or not, had been placed at the disposal of these worthies, and that I would be just as willing to give the grand jury minutes to a defendant as to give them to your honorable subcommittee.

Mr. MOON. How was that, he would as soon give——

Mr. WEBB. He would "as soon give the grand jury minutes to a defendant as to give them to your honorable subcommittee."

Mr. MOON. These rogues?

Mr. WEBB. Yes; Buchanan and those others indicted with him.

Mr. STERLING. He means by that that he thought the committee would turn them over anyhow to Buchanan's lawyers?

Mr. MOON. Oh, yes; it is to Buchanan's lawyers instead of these other parties he is speaking of?

Mr. STERLING. Yes. To what extent were Walsh and Slade present?

Mr. WEBB. They were present most of the time when they wanted to be, but I will say, gentlemen, there is nothing unusual about that, so far as I know. Mr. Marshall could have been present himself. Those gentlemen, in investigating the Dayton charges, there were two lawyers pressing the charges against Judge Dayton.

Mr. STERLING. Did they take part in examining witnesses?

Mr. WEBB. They did. They started out with this method (it was cumbersome, as you will see), by requiring Mr. Buchanan or Mr. Buchanan's counsel to write out each question they wanted to ask the witness. You can see that would have drawn out the examination for six or eight months, so finally the members of the committee said, "Just go ahead and ask a few direct questions yourselves. We sit here, we understand the situation," and that was done in this case.

I should like you gentlemen to read the testimony and see there was nothing—that there were no improper questions asked by this subcommittee of these witnesses in New York, and they do not seem to me to have allowed anybody to ask improper questions.

Mr. LENROOT. I notice in the paragraph preceding that which you have just read the charges that this subcommittee attempted to secure the minutes of the grand jury.

Mr. WEBB. I can make a statement now on that question. I was just taking up what I thought to be contemptuous language. The truth is that one of the compelling reasons why we went to New York was that these charges having been made and sent out over the country, these charges not only against Buchanan but charges that other indictments had been procured by Mr. Marshall before the grand jury without sufficient evidence, or without any evidence, and these gentlemen thought they would go up there and take a private look at these grand jury minutes and come back, never dreaming of allowing Mr. Buchanan or his counsel to ever put an eye on those minutes; and when we got there we asked Mr. Marshall if he had objections to submitting the grand jury minutes. Mr. Marshall replied that he would have to consult the Attorney General; and he did telegraph to the Attorney General, and the Attorney General wired back that he did not think the committee ought to ask or demand the minutes of the grand jury.

I can say there are ways in which you can get the minutes of the grand jury in other trials; and I am not so sure, gentlemen, I have advised all through this hearing the members of the subcommittee not to make the grand jury minutes public, not to insist on their production, and not to allow any testimony to be presented in this hearing that was presented before the grand jury, but to confine their hearing, which they did, to the question as to whether or not any testimony was taken upon which the grand jury might act. Not the sufficiency of it, but was the testimony had; and that was the line on which these gentlemen pursued this entire investigation up there. When Mr. Marshall presented the telegram to the members of the subcommittee, that was the end of the grand jury minutes. They never issued subpœna duces tecum to get the minutes at all: but I think if any court in the land has the power to compel the production of the minutes of the grand jury in a case, this court has got that power. It is the highest court in the world. But they did not exercise that power. They never issued a subpœna duces tecum, and when Mr. Marshall presented this telegram from the Attorney General, that was the end of it.

Mr. NELSON. We never made it public. We had a little private talk with him, but he gave it publicity.

Mr. WEBB. Yes; this newspaper article is headed: "The district attorney refuses Buchanan evidence." That is the heading of this article I have been quoting from. He went out and gave it to the

newspapers, but the rest of it the subcommittee never made public; any part of it.

He said:

I told him you were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh.

I believe I have read that. I will now read one more extract from this letter:

I said that it was i..comprehensible to me how your honorable subcommittee should rush to the assistance of an indicted defendant; how you had apparently resolved to prevent prosecution by causing the district attorney in charge to be publicly slandered.

I told him that I would not permit the prosecution of the persons whose cause you had apparently espoused to be impeded by you; I said that if you wanted the minutes of the grand jury in any case you would not get them as long as I remained in office.

Now I will read the last paragraph:

It is amazing to me to think that you supposed that I did not understand what you have been attempting to do during your visit here. I realized that your effort was to ruin me and my office by publishing with your full approval the complaints of various persons who have run afoul of the criminal law under my administration. Your subcommittee has endeavored by insulting questions to my assistants and others, by giving publicity and countenance to the charges of rascals, and by refusing to listen to the truth and refusing to examine public records to which your attention was directed to publicly disgrace me and my office—

And so forth. "I propose to make this letter public," and does so, and does it before it gets to the hands, so I am informed, of the subcommittee itself.

Mr. STERLING. Did the subcommittee ask Mr. Marshall for the grand jury minutes in any other cases than the Buchanan case?

Mr. NELSON. Yes.

Mr. WEBB. All the cases covered by the charge.

Mr. NELSON. This was the conversation, if you wish it. The difficulty was to ascertain the truth about these things, and knowing that it was the practice in New York to have a stenographer in the grand jury room, and that this public official had those grand jury minutes, we thought that, being a representative of the highest court in the land on this matter, we had a right to inspect those grand jury minutes; at least we would submit the request to him. So he was asked to come before the committee, and I may say that, while these things are little incidents, they show the hostility, the atmosphere charged with hostility in that courthouse so far as this district attorney's office was concerned. It was difficult for the Sergeant at Arms of the House to get to him. He will testify here that he had to plead with one of his subordinates in order to get to him. He will tell you the conversation. Finally he did come up, and then the Sergeant at Arms finally persuaded him to come up and see the committee.

Mr. Marshall came up. I will not attempt to picture to you the kind of air he assumed and the arrogance. Mr. Carlin tried to introduce him, having met him before, to some of the members of the committee, but his hostility was such that any courtesies were impossible; so Mr. Carlin, the chairman of the subcommittee, tried to explain to him that we were a congressional committee trying to ascertain these facts; that a Member had been accused, and that it was difficult to ascertain these facts without seeing the grand jury minutes.

We asked him if the grand jury minutes were printed. He said they were. Mr. Carlin asked him if he would submit them to the members. In a haughty way he said that he would take it up with the Attorney General. He pretended not even to have read the charges. I tendered him the Congressional Record. He said, "Send it down." He would not take it down.

Mr. WEBB. You mean the Congressional Record?

Mr. NELSON. The Congressional Record, where the charges were in detail.

Well, that was the interview in which we also suggested to him that he had the perfect right to be present, either by counsel or himself. He told us he would not want anything to do with it and he left, as he came, with that superb, arrogant manner of his. Well, it was so ludicrous that we were of course inclined to laugh at the gentleman's arrogance.

Mr. STERLING. Did you ask him the question as to whether there was any testimony before the grand jury?

Mr. NELSON. This man——

Mr. STERLING (interposing). Mr. Buchanan's charge is that indictments were found where there was no evidence.

Mr. WEBB. No evidence in one case and not sufficient in another.

Mr. STERLING. Did you ask him whether or not there was any evidence?

Mr. NELSON. We did not ask him, because he was the gentleman against whom charges were preferred, and it is not customary, you know, to ask the respondent or the defendant in the case. It was not done in the Wright hearings. We never did that. That is a matter for him to volunteer, if he wishes to.

Mr. WEBB. I understand, Judge Nelson, that thereafter he came before you informally.

Mr. GARD. This conversation was entirely executive; did not go into the record; was not uttered in the presence of a stenographer, and we said this to him. The chairman said to him—after the committee had conferred about it, the chairman said to him this: "Have you read the charges preferred against you?" He said no, he had not read them; had not paid any attention to them. We said, "Some of the charges are that you have used your office to return indictments against persons without any testimony. We should like to have a talk with you as to whether you would be willing to submit to the committee such minutes of the grand jury as may be called for, or whether you would prefer us, if we choose, to call for the minutes, to ask for them upon the authority of our committee." That was the extent of our conversation. He said, "Well, I will take that up with the Attorney General," which I think was very proper. Then he became, as Mr. Nelson said—his manner was hostile at that time, had been hostile all the time. He said, "If you want to know anything, why do you not ask Buchanan what he did with this money that he got from such and such a place." I have forgotten the source. We did not make any reply to that, because that was not for us to investigate.

Mr. NELSON. We did ask—the chairman did ask for both minutes; suggested that not only the minutes in this indictment of Buchanan, but also these in the Rae Tanzer case, would be desirable, and explained that it would so materially assist our labors if we could say

there was some evidence. He also said that we were representatives of the Government; that we assured him it would be private, strictly private, and that no one else would be permitted to see them; and with that conversation we left it to him to seek information from the Attorney General, and he promised to reply promptly. Now, mind you, there was a sting of insult in the very reply we got. These are minor matters, but they simply show the hostile attitude of that office all the way through.

Mr. Carlin, the chairman, had tried to explain to him that the House seemed to be particularly concerned with ascertaining the fact whether a Member of the House, in his official capacity, had been indicted for things done in the House, and that we should like to ascertain whether they were true or not; whether there was some evidence. Mind you, when he replied—and I do not believe it is in here—but after tendering him the record he sent it back with a letter saying that he returned it with thanks, etc. Then he said he had looked these charges through and he had not found anything there along the lines suggested by Mr. Carlin, therefore it must have been evolved in the consciousness of some person or persons, the implication being direct that some one had told him something that was not true. That is just suggestive of the treatment we received all the way through.

Mr. LENROOT. At what point in this proceeding was the request for the minutes of the grand jury preferred?

Mr. NELSON. In the afternoon of the first day.

Mr. LENROOT. Of the meeting in New York?

Mr. NELSON. In New York; yes, sir.

Mr. GARD. Right after we organized.

Mr. NELSON. We had one or two witnesses, then decided that this was a laborious thing to fish around the outside and try to find out whether there was evidence or not; that here was a public document. We knew they used these grand jury minutes in the State of New York frequently, and for purposes of justice it was always admissible to bring them out. We were accredited officers of the law; this was the high court of impeachment obviously this officer could give us access to such documents by which we could at once discharge our duty and say to the House, "Yes; there is evidence."

Mr. LENROOT. You say there were two charges in relation to this evidence—one that there was no evidence and the other that there was not sufficient evidence. I want to ask whether your subcommittee decided that it was proper to investigate the question of the sufficiency of the evidence and desired it for that purpose?

Mr. NELSON. No; I did not mean to imply that.

Mr. LENROOT. Did you decide that it was not?

Mr. NELSON. We did not decide, certainly——

Mr. LENROOT (interposing). So far as this inquiry in New York was concerned, I mean.

Mr. NELSON. We went along on the plan that we would ascertain whether or not there was probable, prima facie evidence and determine whether this man had acted arbitrarily or not, or whether he had supplied evidence of such a character that it would be prima facie in an indictment of a Member of Congress.

Mr. LENROOT. Did you then have in mind determining whether or not the grand jury was warranted if the evidence was sufficient

to warrant the grand jury in making the indictment, or whether there was any evidence?

Mr. NELSON. No; we did not attempt to weigh the evidence in the sense of determining it was sufficient. We never had that in mind; at least it never occurred to my mind, but merely to determine this, whether this man had acted arbitrarily, whether there was evidence of such a character to show that he had it in good faith, and not simply retaliated against a Member of Congress for what he did in the House.

Mr. WEBB. On that point I want to state to the committee——

Mr. NELSON (interposing). You will find in the evidence, if you will read it, that that was in my mind. The thing I was concerned about, gentlemen, was whether a Member of Congress had been questioned in this way for things done in the House. Though I thought, when we had the grand jurors before us, not to ask as to the evidence, but to find out whether they knew of this indictment, whether that was talked of in the grand jury—I mean this impeachment of Mr. Marshall; whether that was talked about in the grand jury; what the methods were, whether they had given them a fair chance or not; whether he had simply been indicted with a mass of fellows and in what way they had handled the matter. We did not go into the evidence. We would not permit any questions that would tend directly to ask what the evidence was. It was a very difficult matter to handle, so we thought if we could get the grand jury admitted we could ascertain in a moment, but being denied we did nothing further in the matter.

Mr. GARD. As far as my own opinion is concerned, I am very frank to say to you that I think the subcommittee was entirely without authority to weigh the evidence or consider what the evidence should be; that it was limited, necessarily, to whether there was any evidence or any approximate evidence which would authorize an indictment. In other words, a distinction between returning an indictment upon evidence and an indictment by coercion, without evidence.

Mr. WEBB. On that point I wish to say that on the 14th day of December Mr. Buchanan arose in the House and impeached Mr. Marshall, charging five or six different charges. On the 28th day of December, 14 days later, the indictment against Mr. Buchanan was found; then on the 12th day of February Mr. Buchanan was reimpeached, you might say, to another set of formal articles of impeachment.

Mr. GARD. Amended charges?

Mr. WEBB. Amended charges, and I think he intimated on the floor of the House—it was certainly discussed around the table—that this indictment of the 28th, of Mr. Buchanan, was or might have been—looked like it was in retaliation of Buchanan's impeaching measure on the 14th day of December, and that is why these gentlemen wanted to satisfy the House that there was no such fact in the district attorney's conduct, or that it was a fact. That is why, I imagine, they were asking these questions.

Now, gentlemen, I do not believe, as far as I am concerned, that I have a particle of feeling against Mr. Marshall, and you gentlemen have not, and no member of the committee has. I started out in this whole matter with the very highest regard for him. I had heard and knew from what a good many said that he was a man of high

character, a great lawyer, and stood splendidly at the bar in New York. In fact it was a pleasure to many of us to hear great lawyers give him that kind of reputation.

I am talking around the board now, but the members of the Judiciary Committee, and I might say a majority of people, probably an overwhelming majority of people, feel the same way toward Mr. Marshall; and I am going to say further that I thought from the very beginning that it was very improbable they would ever fix anything on Mr. Marshall to cause the committee of the House to impeach him. That was the attitude I can say of the chairman, and I believe that was in the breasts of all the members of the committee when they started out to investigate these charges by direction of the House.

Gentlemen, as to whether or not this is a contempt is entirely within your breasts. I know of no other court, a little police court down here, or even a magistrate's court, or any other inferior court, while hearing the testimony in regard to the defendant, if such judge should receive such a letter with the notification to the judge who got it that the writer expected to make it public for the purpose of disgracing the judge that was investigating him, I know what would happen to him. They would put him in jail and put him there for a good long term.

Mr. GARNER. In order to make the record perfectly clear, in view of Mr. Marshall's statement that, "I said that your expedition to this town was not an investigation conducted in good faith," I should like to ask the subcommittee whether the investigation was being made in good faith or not?

Mr. WEBB. Entirely so.

Mr. NELSON. Yes.

Mr. GARNER. And again he says:

I said that it was incomprehensible to me how your honorable subcommittee should rush to the assistance of an indicted defendant.

Were you gentlemen rushing to the assistance of an indicted defendant?

Mr. GARD. We were not. We had no idea of doing anything except seeking to obtain information.

Mr. NELSON. In answer to your question, I want to call attention to the fact that the Committee on the Judiciary resisted the resolution of the House to forthwith instruct the committee to begin the investigation. The chairman made a plea, and I did myself, asking you first to submit the matter to the Committee on the Judiciary, so we might make a preliminary investigation in regard to the facts, and it was only because we had the overpowering sentiment of the House and Mr. Buchanan's added facts and specific charges—he made 40, instead of a few—that led the committee to look into this matter. And, if I may add, I personally requested the chairman not to be appointed on that committee, because I had once served on an impeachment committee for three months, and I knew it was a very laborious and irksome task.

Mr. GARDNER. He says:

You had apparently resolved to prevent prosecution by causing the district attorney in charge to be publicly slandered.

Had you gentlemen resolved upon any proceedings?

Mr. NELSON. Of course not.

Mr. WEBB. No.

Mr. GARDNER. I merely asked that, that it may go into the record directly.

Mr. WEBB. Yes; we understand.

Mr. CRISP. Is that necessary? Will not the record show, will not the resolution show, that these gentlemen were acting in pursuance of the direction of the House to make this investigation?

Mr. WEBB. Permit me to go a point further. I want to give you some citations on the law, if you will permit me. Whenever you gentlemen are wearied I will quit. I have taken more time than I intended to take, but that has come about through questions propounded by the members of the committee, and I am glad you asked questions; that is the best way to elicit information. I hope you will keep it up as long as I am talking.

As I said, it is entirely for this committee and the House to pass upon what is contested, and here is what the Supreme Court says in the case of Anderson *v.* Dunn. You will find the report in 6 Wheaton, written by Mr. Justice Johnson, one of the justices of that court, a great justice, and Judge Marshall. Here is what they say about the contempt of the House:

> Nor would their situation be materially relieved by resorting to their legislative power within that district. That power may, indeed, be applied to many purposes and was intended by the Constitution to extend to many purposes indispensable to the security and dignity of the General Government, but they are purposes of a more grave and general character than the offenses which may be denominated contempts and which, from their very nature, admit of no precise definition. Judicial gravity will not admit of the illustrations which this remark would admit of. Its correctness is easily tested by pursuing, in imagination, a legislative attempt at defining the cases to which the epithet contempt might be reasonably applied.

As I said a while ago, Crocker, in section 2, paragraph 5, says:

> And the House of Representatives shall have the sole power of impeachment.

There have been, from the year 1800, witnesses and slanderers of the House and the Senate punished for contempt by your body, up to the time Mr. Glover was punished for an assault upon Judge Sims; but every one of these cases arose out of the general power of the House and the Senate, as set out in Dunn *v.* Anderson, to punish for contempts against the body. There never has been in the history of this Government a plain, straightforward case of contempt under an indisputable power of Congress, and that is the sole power of impeachment. There the Constitution makes Congress the highest court in the world, as it says in one case it is the grand inquisitor of the Nation.

Gentlemen, I want to submit to you this: If, whenever the House of Representatives, in pursuing its constitutional prerogatives, investigating officials of the country, who may be bad or good; if you have not the power, not only to send your subcommittees and committees to investigate charges made by a Member of the House, and protect that committee, wherever it goes, with all the dignity and authority that any committee or court ought to have, why, then, the power of impeachment is nothing but a farce in the hands of the House of Representatives.

Mr. STERLING. I have no doubt but what a contempt committed against a committee would be a contempt committed against the House.

Mr. WEBB. That is the point I am arguing, Judge Sterling. As I said a while ago, when this committee went to New York it went there as the House of Representatives.

Mr. STERLING. It was the House, acting as such; it was its authorized agent.

Mr. CRISP. I do not suppose there is any difference of opinion in the minds of the committee as to the inherent right of the House to punish for contempt.

Mr. STERLING. I do not think there is any doubt about that.

Mr. WEBB. If there is any doubt about it I want to refer you to this celebrated case of Dunn *v.* Anderson, where the court distinctly says, as Judge Crisp has suggested, that it has the inherent power that every representative body has, the right of self-protection and the right to repel and punish insult to the dignity of that body. But that case even arose not in such a clear case as the impeachment process; it arose because a witness had refused to answer a question, or had made some slanderous charge against the House of Congress or the Members, or had attempted to bribe a Member, or had published the Journal of the Senate, contrary to the rules of the Senate, or had charged that in the sugar schedule of the tariff act that Senators were corrupt. In all of these cases both the House and the Senate used the inherent power to punish for contempt. And the courts say that of necessity that power exists.

But even in Kilbourn *v.* Thompson (103 U. S., 168), and in some of the reasoning in Dunn *v.* Anderson, they say there is no doubt about it in impeachment matters; and in trying election cases you do not have to imply power. The Constitution expressly gives the authority to Congress to make this impeachment investigation. And Judge Marshall, in the case of Marlboro *v.* Maryland, I believe it is, says that wherever the Constitution gives the Congress the power to do a certain thing, all things that are necessary to carry out that power go with it incidentally, and one of those powers is the power either to protect itself from insult and assault by contempt proceedings.

Mr. LENROOT. With reference to this matter of punishment, you are familiar with the Duane case, are you not?

Mr. WEBB. Yes, sir.

Mr. LENROOT. As I recollect the Duane case, so far as the punishment is concerned, they instructed the arrest——

Mr. WEBB (interposing). The Vice President?

Mr. LENROOT. No; the President, I think, in that case, was instituting the proper prosecution. I do not find there was any statute then with reference to the Constitution for refusal to testify.

Mr. WEBB. No; that was passed in 1857.

Mr. LENROOT. Now on what theory, have you thought of it, did the Senate in that case not exercise its own power of punishment, but passed it into the judicial branch of the Government?

Mr. WEBB. I am not sure, but——

The CHAIRMAN. Was that the Duane case?

Mr. LENROOT. Yes.

The CHAIRMAN. That was punished by the Senate, and Duane was confined 30 days for the printing of that article in the Aurora.

Mr. NELSON. I remember that distinctly, if I may answer.

Mr. LENROOT. Perhaps I am mistaken.

Mr. NELSON. No; you are correct. There was the contempt by publication, and the Senate took jurisdiction, brought him to the bar of the House, and there was an indictment; he refused to testify, so he was held for about 30 days as a contumacious witness; then toward the end of the session of the Senate—the last day—it was obviously too little time to act upon it, so they simply disposed of the case by adopting—requesting the President to direct the law officer to bring action in the courts, and the court sent him to jail for 30 days and assessed the cost upon him. The answer to your question is it was the last day and they had no further time, and that was the only way of disposing of it.

Mr. LENROOT. Then Congress has no power to punish beyond the term?

Mr. NELSON. Well, the Senate's term is a question of doubt. But let me emphasize this fact, that in that case you see the three branches of the Government have cooperated in punishing for contempt of a branch of the Congress.

Mr. WEBB. Here is what is said in the Duane case:

The question of the power of the Senate to punish for contempt arose in 1800 in the case of William Duane over a publication in the General Advertiser or Aurora, which was found to be false, defamatory, scandalous, and malicious, and Duane was found to be in contempt of the Senate. He appeared before the Senate in response to first notice but failed and declined to appear when ordered at a second date. This being at the end of the session, on the last day of the session he was ordered prosecuted by the courts of law, and was prosecuted and punished.

Here is what Senator Sumner says. He even says the House has more authority in a case of this sort than the Senate. He said, in 1860:

To the House of Representatives are given inquisitorial powers expressly by the Constitution, while no such powers are given to the Senate. This is expressed in the words, "the House of Representatives shall have the sole power of impeachment." Here, then, obviously, is something delegated to the House, and not delegated to the Senate—namely, those inquiries which are in their nature preliminary to an impeachment—which may or may not end in impeachment; and since, by the Constitution, every "civil officer" of the General Government may be impeached, the inquisitorial powers of the House may be directed against every "civil officer," from the President down to the lowest on the list.

This is an extract from Senator Sumner's speech in the Senate.

Now, I want to read another case. This is the most celebrated case ever written, in my opinion, of the power of the House to punish for contempt. It was written, as I said a while ago, by a court composed of such distinguished men as Judge Story and Judge Marshall. I will just quote one or two extracts here:

This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberate assembly, clothed with the majesty of the people and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness or repel insult is a supposition too wild to be suggested.

Mr. MOON. Is that Justice Johnson's opinion?

Mr. WEBB. Yes, sir. That opinion is full of just such expressions as that.

Mr. STERLING. How did that case come before the court?

Mr. WEBB. Suit brought against the Sergeant at Arms. The Sergeant at Arms had Anderson, a witness, in custody, and it came up collaterally. They have held that in a direct order of the House for the arrest of a person the courts have no jurisdiction to take him out of the custody of the House, and can only be brought up collaterally, and not directly.

In Kilbourn *v.* Thompson, which I referred to a while ago——

Mr. STERLING. Was that suit for false imprisonment?

Mr. WEBB. Yes, sir; that was what Kilbourn contended, that it is a case of false imprisonment, Kilbourn refusing to answer certain questions put to him by the House of Representatives concerning the business of a real estate partnership, concerning holdings of real estate, a real estate pool.

The powers of Congress itself, when acting through the concurrence of both branches, are dependent solely on the Constitution. Such as are not conferred by that instrument, either expressly or by fair implication from what is granted, are "reserved to the States respectively or to the people." Of course, neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body, except in the few instances where authority is conferred on either House separately, as in the case of impeachments.

There, this judge, in Kilbourn *v.* Thompson, points out that the House of Representatives has more power than Congress combined has, because the Constitution confers that power solely upon the House of Representatives, and at other places in this same decision they are referred to, the great power of impeachment, as authority that is not doubted at all.

If there is any doubt about the attitude of the Supreme Court on this question, since the opinion of Kilbourn *v.* Thompson, there has another case arisen, the Chapman, which you will find reported under title "In re Chapman, petitioner, in 166 U. S., 661," and here again Chief Justice Fuller, writing the unanimous opinion of the court, in which Judge Harlan concurred——

Mr. NELSON. Justice White was on the court, too?

Mr. WEBB. Yes; reiterated the statement that the House of Representatives has the inherent power to punish for contempt.

This case arose in this manner. This man Chapman was indicted for refusing to answer questions and was convicted, but in 1857 the House of Representatives—Congress, rather—passed a law making it a misdemeanor for a witness to refuse to answer questions. When this case came to the Supreme Court, Chapman's counsel took the position that Congress, having passed that law, divested itself of the power to punish for contempt, because there could only be one offense, and if Congress was going to let the courts punish for refusing to answer questions, then the House itself could not do it.

This is what the court says:

While Congress can not divest itself or either of its Houses of the inherent power to punish for contempt, it may provide that contumacy in a witness called to testify in a matter properly under consideration by either House, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States.

Although that is done, the House and Senate still have the inherent power to punish for contempt, etc.

Under the Constitution the Senate of the United States has the power to try impeachments; to judge of the elections, returns, and qualifications of its own Members,

to determine the rules of its proceedings, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member; and it necessarily possesses the inherent power of self-protection.

The refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the Senate, of course, constitutes a contempt of that body, and by the statute this is also made an offense against the United States.

The history of congressional investigations demonstrates the difficulties under which the two Houses have labored, respectively, in compelling unwilling witnesses to disclose facts deemed essential to taking definite action, and we quite agree with Chief Justice Alvey, delivering the opinion of the Court of Appeals, "that Congress possessed the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence to enable the respective bodies to discharge their legitimate functions"; and that it was to effect this that the act of 1857 was passed. It was an act necessary and proper for carrying into execution the powers vested in Congress and in each House thereof. We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended: but, because Congress, by the act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved, and the statute is not open to objection on that account.

Nevertheless, although the power to punish for contempt still remains in each House, we must decline to decide that this law is invalid because it provides that contumacy in a witness called to testify in a matter properly under consideration by either House, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States, who are interested that the authority of neither of their departments, nor of any branch thereof, shall be defied and set at naught.

Gentlemen, that is all I care to say there. I have got a mass of matter here, but I want to refer you gentlemen to a recent report so ably presented by Judge Davis and Judge Crisp and the other members of that subcommittee.

Mr. CRISP. Judge Nelson?

Mr. WEBB. And Judge Nelson. They discussed the power of the House to punish for contempt. It is the only copy I have.

Mr. LENROOT. I should like to ask, if you are through with your main argument, one or two questions upon the resolution before us. Were precedents followed confirming this resolution?

Mr. WEBB. I think so.

Mr. LENROOT. What I have especially in mind, the resolution which upon its face seems to delegate to this committee the power of finding the fact.

Mr. WEBB. Yes, sir.

Mr. LENROOT. Namely, the contempt.

Mr. WEBB. I think that is almost the resolution that is set out in the Sims-Glover case.

Mr. LENROOT. Was it the thought that this committee will find the fact—that the House has delegated to this committee its power over the subject?

Mr. STERLING. Do you say finding the fact, or reporting the fact?

Mr. LENROOT. Finding the fact.

Mr. WEBB. That is the same as reporting.

Mr. STERLING. I do not believe it is.

Mr. MOON. Then we want to report the procedure.

Mr. LENROOT. And the procedure, and in case they find a contempt has been committed to the end that the privilege of the House may be maintained.

Mr. NELSON. In the Sims case we found as a fact——

Mr. WEBB. Here is what was said:

Resolved, That a committee of five Members be appointed to investigate * * * for the purpose of ascertaining the facts, etc., that said committee shall have power to send for persons and papers.

Mr. LENROOT. Is it your idea that this committee shall find the fact, and that it shall then be conclusive upon the House, or the House itself, upon the proper matter getting before the House, will pass upon it?

Mr. WEBB. I think undoubtedly the House wants this committee to make a finding of fact. Of course, no finding of fact will be binding upon the House if it wants to disregard it, but I think the House wants a finding of fact, and I think that is the course which has been pursued during years past.

Mr. STERLING. In that Glover case the committee recommended and set out the method of procedure, and the House followed it.

Mr. LENROOT. In some of the cases I notice in the reports, after finding the fact they set out the procedure by directing or recommending the method in which the trial shall go on in the House; questions to be asked by the Speaker, and so on. Whether it is necessary for us to go that far or not I do not know.

Mr. CRISP. We set that out. I remember a finding of facts was read to Glover when he was brought before the bar, and the Speaker asked him if he desired to be heard, by himself or attorney, and he admitted the facts, and the whole procedure was set out.

Mr. MOON. Where they do not admit the facts the procedure should then go further and show the manner in which the trial should be held.

Mr. STERLING. I know one or two instances where the trial was had before the House. It would be perfectly proper to refer it to a committee.

Mr. LENROOT. I think that would be true. I was wondering whether that was the thought in the mind in this resolution, or whether it was merely a recommendation of the committee to go before the House.

Mr. CRISP. The House practically refers the contest of the seating of its own Members to a committee. The House does not take up the question of facts there. For instance, the Election Committee finds all facts, then makes a report.

Mr. LENROOT. It goes to the method of our report, whether we report and that report is sustained, or whether the House itself shall have the right.

Mr. WEBB. Now, Mr. Chairman, Judge Nelson and Judge Gard are here.

Mr. MOON. We shall be glad to hear from both of them. Which one of the gentlemen will address the committee?

STATEMENT OF HON. WARREN GARD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO.

Mr. GARD. I merely desire to state, gentlemen, that, despite the fact the letter was sent to the subcommittee, and incidentally against the whole House, by Mr. Marshall, district attorney for the southern district of New York, that I feel that I can be so impartial as to return

an honest expression of opinion upon the evidence submitted, upon the facts in the case; that is, as to the ultimate thing to be determined, whether or not Mr. Marshall is or is not guilty of the charges of impeachment which have been preferred against him; and, therefore, as it is personal largely to me as one of the members of the subcommittee, I would refrain from expressing any opinion upon this matter which has been brought before you now, to wit, the charge of contempt, and I would be very glad to assist in informing the committee of any of the facts of which you care to have notice, other than those which appear from a casual reading of the record, because I, with other members of the committee, have probably a more comprehensive knowledge of the facts and can explain them to you in a quicker manner than by reading them over.

Mr. STERLING. May I ask you, Mr. Gard, did all of the members of the committee go to the district attorney's office with reference to these grand jury minutes?

Mr. GARD. We did not go to the district attorney's office. The facts in that case were these: That after we met in New York we heard one or two witnesses, and we determined that the big thing for us to find out was whether or not the charge by Buchanan was true; the charge that he made, and which was discussed on the floor of the House, and which seems to me to be really the controlling charge in the passage of the resolution creating this committee and authorizing the investigation of the impeachment charges, was this: That Buchanan, a Member of Congress, had been indicted by this district attorney because of matters which he (Buchanan) had spoken upon the floor of the House, and that he had been indicted because of that fact and without evidence. That was a charge which Buchanan made, and he reiterated it before the Judiciary Committee as to himself and other persons. But in so far as I am concerned, and I think in so far as the House was concerned, the very vital question was to determine whether or not the privileges of speech on the floor of the House had been invaded by this district attorney and this indictment had been returned through the agency of the district attorney because of what Mr. Buchanan had said on the floor of the House.

I refer to what Mr. Buchanan originally said when, on December 14, 1915, he presented some 10 charges of impeachment. After these 10 charges of impeachment were presented on December 14, and about two weeks thereafter, he was indicted by this grand jury in the southern district of New York, of which district Mr. Marshall was the district attorney, upon this charge of conspiracy of an attempt—I have forgotten the language.

Mr. WEBB. To restrain interstate and foreign trade.

Mr. LENROOT. Let me ask you this: Was there any evidence before your committee on the subject as to whether or not there had been newspaper reports of the probable indictment of Mr. Buchanan before the impeachment?

Mr. GARD. No, we did not go into the discussion of newspaper reports. I am frank to say to you that we discovered evidence—this is one of the facts—we did discover evidence that there had been a consideration of the charge upon which Mr. Buchanan was later indicted.

If the committee will pardon me a moment I will tell them, as a matter of fact, the way this thing came up. There was a man by the name of Von Rintelin, who was a German agent. He came to this country, so the evidence showed, with some money from his Government, first for the purpose of buying supplies; and it was said in the evidence which we obtained from those who testified (notably from a man by the name Bielaski, who is Chief of the Secret Service Bureau here in Washington, attached to the Department of Justice) that, failing to buy supplies, he was attempting to influence persons to obstruct interstate commerce and trade by inciting strikes and damaging buildings and things of that kind.

The matter first arose by reason of the application of Von Rintelin for a passport as an American citizen. He had been in this country and desired to return to Germany or England, I have forgotten which. At any rate, he made an application to the State Department for a passport, giving a fictitious name. While he was in New York it seems that Von Rintelin, who had not been suspected, went out to dinner one night with a lady, and during the course of the dinner confided to this woman——

Mr. CRISP. Another Samson?

Mr. GARD. Another Samson. Confided to her what he had done, and somewhat boastfully spoke of his progress and achievements along the lines they said he had been commissioned to act. Thereupon this woman reported the facts by letter to the Secretary of State, and the Secretary of State caused investigation to be made through the officers of that department, and that was the beginning of the investigation against Von Rintelin.

In the meantime Von Rintelin had taken passage on boat; he did not get the passport, but he had taken passage and was on the high seas at the time they discovered the attempted fraud in the matter of the passport. He arrived in England and was taken from the boat and was interned, and is now interned in some British prison.

From the Von Rintelin passport case there developed the activities of Von Rintelin with David Lamar, familiarly known as the "Wolf of Wall Street," and others—a man by the name of Martin and a man by the name of Schulteis, I believe.

Mr. WEBB. Also Taylor and Monnet?

Mr. GARD. Yes. And from the Martin and Schulteis end of it there developed the organization of what was called Labor's National Peace Council, it being the charge that Von Rintelin had subsidized Lamar by money, and that Lamar and Schulteis and Martin, I believe, had organized or attempted to organize this Labor's National Peace Council, and that Mr. Buchanan, our colleague from Illinois, was the first president of Labor's National Peace Conference.

It was from that state of affairs that the investigation in the district attorney's office was made primarily, as I have said, following the trail of the fraudulent passport case of Von Rintelin, afterwards leading down into the activities of Lamar, of Martin, and of Schulteis, and then all together leading into the activities of Buchanan and ex-Representative Fowler and ex-Attorney Monnet, of Ohio, and other persons who were identified with what is known as Labor's National Peace Conference.

But it is fair to say, because it is a fact, at least I would say it was an established fact, that the evidence we had showed that there was an investigation of this case as early as September of 1915, the latter part of September, and it is probably, while of course we did not get the evidence and could not establish it positively—it is probable at least to my mind that there was evidence being considered which bore either directly or indirectly upon the association of Mr. Buchanan with this charge of attempting to impede interstate commerce, so that is the statement with regard to the original investigation.

While that disposed of one branch of it there still remained the branch, as charged by Mr. Buchanan that this indictment, which is an indictment of conspiracy—and by the way, I may stop here long enough to say that it is the practice, it seems to be the invariable practice in the courts in New York, in the United States District Court of New York to obtain first an indictment against a defendant for commission of a specific crime, and to follow the indictment for actual commission of the crime with an indictment for conspiracy, in which they proceed to include not alone the defendant but every person that they can possibly associate in any way with the defendant. They have even included in certain cases witnesses. and every person that they can associate in any branch of the case, directly or indirectly. So that the committee upon its first day thought, and honestly thought, that sitting in a purely executive session, Mr. Buchanan not being present nor his attorneys nor anyone, no stenographer, just the three members of the committee—we thought of looking at the minutes of the grand jury to determine whether or not there had been evidence offered before the grand jury, particularly against Mr. Buchanan, because that was the matter that we were immediately charged to investigate. And, as I have said, it seemed to me that the attitude of the United States district attorney at that time was eminently proper, because when we called him in, as I have said it was purely a little round-table talk; no one was present; we said to him, "These charges have been made by Representative Buchanan; that his indictment and other indictments have been returned without evidence," and we said we had been commissioned to investigate this, and we asked him whether he would voluntarily submit the minutes of the grand jury in certain cases, such cases as we might desire to look at, or whether he would prefer that we issue the process of our committee. He said that that was a matter he felt he should consult with the Attorney General about, and he asked sufficient time to communicate by letter or telegram with the Attorney General and we readily accorded him that, and he did so communicate with the Attorney General, and he advised us as his opinion and that of the Attorney General that the minutes should not be given to this congressional committee.

Thereupon we did not pursue the subject any further, but we did proceed along the lines of the examination of some four or five of the grand jurors who returned this indictment. In each case, as my recollection is, we told them that we realized what the ordinary oath of a grand juror was, and that we did not wish to insist upon any question which they thought should be privileged or which would in any way violate their oath, because all of the committee felt that we were not judges of the weight or of the sufficiency of the evidence, but only

as to whether or not the charges had been sustained and that indictments were being returned without evidence and solely by direction of the district attorney for the southern district of New York.

As I have stated, we heard the evidence of four or five—five, I believe—members of the grand jury, and then we proceeded along the lines of other evidence.

Mr. CRISP. May I interrupt you there?

Mr. GARD. Certainly, sir.

Mr. CRISP. It was stated by Judge Nelson that it was common practice in New York to have grand jury presentments presented to the courts when they were necessary in evidence. What method do they take in the State court; do they get a subpœna duces tecum?

Mr. GARD. You mean to produce the records of the evidence of the grand jury?

Mr. CRISP. Yes, sir.

Mr. GARD. In the New York court the practice is this, so I was told. When you desire the production of the minutes of the grand jury the defendant files a motion with the court asking that the county district attorney produce for the examination of the defendant the records of the minutes of the grand jury, and while that is a privilege, it is a privilege entirely within the discretion of the court, and the evidence before us was that it is a privilege which is very seldom given—that the courts in New York have almost universally held that these minutes should not be offered to the defendant.

In some places, as members of this committee know, the names of witnesses are returned upon indictments, but in the New York courts that practice is not followed.

Mr. CRISP. I did not make myself clear. I understood that Federal grand jury presentments were presented to the court. That is what I wanted to know, it that is true.

Mr. GARD. No; I think not.

Mr. CRISP. What I wanted to get at was whether there was any discrimination in refusing the minutes to this committee where they did furnish minutes to the court.

Mr. GARD. No; I think not. This is what use they make of grand jury minutes in the Federal court. There is no Federal statute authorizing the defendant to have the privilege of inspecting the minutes, but there is such a statute in the State of New York, and the ordinary rule is that the State statutes govern in the jurisdiction where the United States authority is invoked. But it is my understanding that the courts always hold that it is a matter entirely in the discretion of the court and, as a matter of fact the minutes have very seldom been awarded in the county courts and, as far as I am advised, none at all in the Federal courts.

Mr. CRISP. The Federal courts are the ones in regard to which I inquired.

Mr. GARD. There are none at all given in the Federal courts; there have been some requests made, but the minutes have never been given to the inspection of the defendants. We did not, of course, intend to have these minutes given to the inspection of the defendant Buchanan, or any of the other defendants. It was simply a matter in our mind of looking at these minutes to determine a question as quickly and correctly as possible whether or not there had been evi-

dence, and at what time the evidence began to associate itself with the investigation against Buchanan as bearing upon the charge which Buchanan made, that his indictment was directly caused by what he said on the floor of the House on December 14, 1915. That is when he impeached Marshall. We thought that by seeing the record of the evidence we could find whether or not when Buchanan made this first charge there had been up to that time anything against Buchanan or whether it was after that and their reason of making this charge was that Buchanan had been associated in this charge of conspiracy.

I think it is in the mind of every member of the House that the big question, the solemn question in all this case is as to whether or not the privileges of Members of the House in free speech on the floor have been invaded, otherwise it is my opinion that the great bulk of the charges here contained are charges that never should have been brought to the attention of the impeachment proceedings, but nevertheless they are here, and largely here because of that one predominant fact, and we have been commissioned to make investigation of them.

Mr. STERLING. Did you learn this, as to whether or not Buchanan's case and Fowler's case had been presented to a grand jury before a date in December that Buchanan made the first charges?

Mr. GARD. I said that was the reason we desired to inspect the minutes; but there was evidence that the original case, the Von Rintelin case, had been considered as early as September, of 1915, and that this Buchanan case is an outgrowth of the original case; it all grew out of the first charge against this German agent, Von Rintelin, and we could not find from the evidence of the jurors, whose testimony necessarily would not be as conclusive as the written record, when it was that the charge against Buchanan was first made, or that there was any assertion of investigation against Buchanan, so we thought if we could get these minutes and see them, they would forever settle that one disputed question.

The minutes were refused us by the district attorney, acting on the advice of the Attorney General, it is fair to add, and we felt that the matter was of probably such privileged nature, since the Attorney General directed that the district attorney not disclose the minutes, that we would not pursue that investigation any further.

Mr. STERLING. Did the grand jurors answer your questions?

Mr. GARD. They did.

Mr. STERLING. That is in this record?

Mr. GARD. Yes, sir; they answered very frankly, most of them. Of course some of them did not have very good recollection about the matter, but one or two of the witnesses were surprisingly good in my mind in what they did recollect about the proceedings before the grand jury.

Then the committee followed the further investigation of testimony and as the chairman of the committee has said, and Mr. Nelson said likewise, they were forced to follow, as in every impeachment, the testimony of the man who makes the charge of impeachment.

To my mind the charge of impeachment is of such solemn character that no Member of the House should make the charge unless he has evidence which he honestly believes will substantiate or corroborate

at least the charges he has made, and therefore we took the testimony, the names of the witnesses given us by Mr. Buchanan.

Of course we would have the committee know, which is a fact, the peculiar circumstances of this case in that it related to Mr. Buchanan itself. It is not such a case as one would consider against a district judge, or a judge of any other kind, or any other Federal officer affecting his conduct in general, but here is an allegation that the conduct complained of by this Member of Congress affected him individually; that the conduct of the district attorney for the southern district of New York affected the substantial rights of freedom and liberty and the free speech of this Member of the House of Representatives.

Then Mr. Buchanan said on the floor of the House, and we all know, I suspect more or less of the truth of this, that he was not a man of large means; that he was not a man skilled in the interpretation of law, and the committee being not a court, being not commissioned to sit in final judgment on the matter, but being a committee of investigation and therefore largely inquisitorial, afforded what it thought a reasonable latitude to this Member of Congress, possibly a latitude somewhat greater in extent than it would have afforded under any other circumstances; but being a Member of Congress, and under the conditions I disclosed, we felt that the House would demand of the committee a substantial compliance with the request of the House that we investigate these matters which Mr. Buchanan had said upon his authority as a Member of Congress were charges of impeachment, so that we got these witnesses from day to day and from time to time from Buchanan, and so far as the attorneys were concerned, being present, Mr. Walsh and David Slade were present, that is true, except when we did resolve to go into executive session.

The complaint is made that we should have been all the time in executive session. I do not know as to that, but I have served on the impeachment case of Judge Dayton down in West Virginia last year and all the hearings we had were open hearings. We had none at all of a secret character, and the evidence in that case was prepared and many of the questions were asked by attorneys employed by an association which was opposed to the continuance of Judge Dayton on the bench.

Two different attorneys were present and prepared the case and asked questions; of course, the members of the committee asked questions too; but these attorneys were from time to time privileged by the committee to ask questions. So that was the plan we adopted in New York.

It is probably well to advise this committee also that the newspaper men in New York are a very enterprising lot, and it was a matter of investigation of the United States attorney up there and was a very large thing to them. There were probably 20 or 25 newspaper men there all the time and we thought than rather to have a garbled report go out, that in so far as we could, in so far as the circumstances would authorize, we would prefer to have open hearings, so that there could be no mistake as to what was said and by whom it was said.

In the consideration of these matters, in these open hearings, we did not, as the letter of Mr. Marshall states, call "every rogue or scoun-

drel," or whatever his language is. We had such men who appeared voluntarily as a witness, as Mr. Wise, the former district attorney in New York, the predecessor of Mr. Marshall. We had Mr. Stansfield, who is a leading New York attorney. We had the county district attorney, Swan, who appeared there to testify. We had Mr. Whitney, an associate of Mr. Wise; we had several other New York attorneys of high standing, including Martin Manton and Martin Littleton, a former Member of this House, probably known to many members of the committee, and there was no evidence offered as the chairman has said, and no evidence taken by the committee of anyone whom we thought would come within the scope of "rogues," as charged in this letter. But even if there had been, I think the committee was thoroughly able to distinguish between evidence influenced by bias or prejudice or untruth, or even personal motives, and evidence which would be truthful evidence—and it was not that Mr. Marshall waited until there could be any determination by this committee—but it was an attack upon what the committee was likely to do before there was any indication of what they really did intend to report.

The evidence proceeded along lines embraced solely in the charges of impeachment, until there came this matter of the association between the publication of this letter and what occurred afterwards. This publication was made, so the evidence discloses, by a man of the name of Holme, who was a British subject, and, as the letter discloses, was made afterwards by information furnished him by the district attorney. The language used by the district attorney is contained in the letter which you have been advised of.

After this letter was received the committee made no comment upon it. Since the letter has been received the committee has from time to time heard other evidence, and is endeavoring to determine the truth of the charges made by Mr. Buchanan without respect to the criticism if such it may be called, of the committee in this letter, and I can assure the committee——

Mr. MOON (interposing). How long did your committee remain taking testimony after the receipt of this letter?

Mr. GARD. They remained taking testimony—well, we are still taking testimony, Mr. Moon.

Mr. MOON. I mean up there on this trip.

Mr. GARD. The committee had finished its taking of testimony in New York. The committee worked on Monday, Tuesday, Wednesday, Thursday, Friday, and Saturday in New York. On Saturday we adjourned early because some of the members desired to return to Washington, and at about 3 o'clock in the afternoon notice of this was transmitted to Mr. Carlin, so far as my information goes. I did not see the letter until later, when Mr. Carlin, the chairman of the committee to whom it was addressed, showed me the letter.

Mr. STERLING. Then you did not go back to New York any more?

Mr. GARD. No, sir; we did not go back to New York any more. We held a session in New York on Saturday, but this letter was delivered to Mr. Carlin by messenger on Saturday afternoon after we had finished our labors up there, and so had announced.

Mr. LENROOT. At this executive session the hearing shows that you adjourned at 12 o'clock noon after holding your executive session.

At that executive session did you determine you had completed your investigation so far as the New York end was concerned?

Mr. GARD. Yes, we had heard all of the witnesses whose names had been given to us as being witnesses who we could get in the city of New York on these different lines.

Mr. LENROOT. May I ask you what were your relations with these attorneys of Mr. Buchanan's in New York?

Mr. GARD. I will be very frank to tell you that. Mr. Buchanan, as you know, is not an attorney. He has no knowledge of how any charges should be framed or how they should be presented.

He was represented in Washington first by former Congressman Hill, of Illinois, who, I think, still appears sometimes as his representative. Then he secured the services of a man by the name of English to act as his attorney in the city of New York, Mr. English being the same man who was a short time ago shot and killed by his wife in a little mountain home down below Frederick, Md.

When we got to New York, Mr. Buchanan told us that Mr. English was no longer appearing as his counsel; that he had a man by the name of Walsh as his counsel. I have forgotten what Walsh's first name is, but I think it is Walter J. Walsh; and Mr. Walsh appeared, I believe, with a written authority from Mr. Buchanan that he was his attorney; at least he was the attorney for Mr. Buchanan.

Our relations with these attorneys were the same. When we heard the case in Washington, we permitted Mr. Hill to be present. It was our policy to examine the witnesses ourselves, and we then conferred at the conclusion of the examination with the attorneys and asked them if there were any questions which occurred to them that we had not asked, and sometimes they did ask an occasional question.

We pursued the same course with respect to Mr. Walsh, except in one or two instances, where Mr. Walsh said that there were some matters of which he had knowledge of that he thought he could obtain the evidence better than by having the committee examine, so the chairman of the committee permitted him to examine the witnesses.

Mr. MOON. You let Mr. Buchanan be represented by counsel when necessary?

Mr. GARD. Yes, sir.

Mr. LENROOT. What I have in mind, particularly, was this: Your relations with these attorneys were entirely within your official capacity?

Mr. GARD. Entirely. There was some feeling on the part of Mr. Buchanan that we had not given sufficient latitude to his counsel, I am frank to say. But I thought we had. I felt that the committee was really the body which should ask the questions and that we should permit the attorneys for Mr. Buchanan to be present only in an advisory capacity. We had no relations with them except of an official character. Personally I did not see any of Mr. Buchanan's attorneys at any time except when they were in the court room, and I had no acquaintance either with Mr. English, Mr. Walsh, or any of the other attorneys of Mr. Buchanan, except Mr. Hill. I knew him, of course, as a Member of Congress last year, but our relations with them were purely official.

Mr. LENROOT. One other question. Throughout this entire proceeding your committee had in mind Mr. Buchanan's personal interest in this case?

Mr. GARD. Entirely so.

Mr. LENROOT. And you suspected him of the desire to secure evidence that would aid him in the defense of the indictment against him?

Mr. GARD. Of course we indirectly had that in mind. I am sure I did. I felt there might be charges against the committee and the fact might be charged against Congress that if we went along a certain line of attempting to inquire into evidence that we might be accused of doing it for the purpose of helping Mr. Buchanan, who was charged with a criminal offense, and I have felt and feel now, I am very frank to say, that I do not consider the privileges of the House, or our natural sympathy with a colleague as a member of the House, would call for any such consideration by either the subcommittee or the Members of the House. I believe if Mr. Buchanan is guilty of this charge that he should be prosecuted as any other person should be prosecuted and that there should be no special favors shown him by reason of any congressional investigation which would advise him in advance of the evidence which the Government had against him. If that could be true, of course it would be an unjust state of affairs, and the committee never had that in mind at all.

Unfortunately that seems to have been the attitude assumed by Mr. Marshall. I say it is unfortunate, because I think it is unfortunate. Personally I never saw Mr. Marshall but one time, but the evidence which I have heard about him leads me to understand that he was a man of ability and of high character and standing in his profession and as a citizen of the city and State of New York. And I was greatly surprised to learn of his attitude of hostility.

I can assure this special committee that there was no desire on the part of any of the members of the subcommittee or of the Judiciary Committee of the House of Representatives to secure for Mr. Buchanan any evidence which would advise him of that which the Government had possession of; merely to inquire—these, if I may reiterate, these were the two big things in my mind.

When I think of all these things put in here about the Rae Tanzer case, which was a criminal case in New York City, and a lot of investigations about Hebrew attorneys who had been charged by Mr. Marshall with a conspiracy to conceal assets in bankruptcy cases, while there may have been some irregularities in those proceedings, I think they were not of the high character which should have allowed them to have them brought into the House of Representatives as a basis of a charge of impeachment of a public officer. That, if anything, they should have been considered by the superior of Mr. Marshall, the Attorney General of the United States, or by the President of the United States, as to whether or not they were not charges of impeachment.

But there were charges of impeachment against him in this, that he, as district attorney, was, first, returning indictments in his jurisdiction against men without evidence, and, second, that without evidence and solely because of that which Mr. Buchanan has said on the floor of the House, that he caused an indictment for conspiracy to be returned against Mr. Buchanan. Those two things, in my mind, were the controlling things then, and are now; I think they are the big things which the House wants to know—whether these things

have been proven against Mr. Marshall upon the accusation of Mr. Buchanan.

The other matters I am ready to report upon; they are included in what we had to investigate, and we of course will make reports according to the way we view them; but these other two matters are the big things, and the things which the House is interested in, and the things I think we are responsible for in the consideration of the impeachment charges.

Are there any other questions?

Mr. LENROOT. Has your committee now completed its examination of witnesses, or is it still proceeding?

Mr. GARD. No, sir; we heard the two witnesses on Wednesday, we heard witnesses on another line on Wednesday, a witness from Bloomfield, Pa., and a witness from New York, a man from the district attorney's office, and Mr. Walker appeared, and Mr. Buchanan has said to us that he has gone to Chicago and that he would return in a short time and that he would then advise us if he had further evidence.

It seems to me, without violating any confidence, that the consideration of the evidence by this subcommittee is about concluded, unless Mr. Buchanan unexpectedly comes forward with more witnesses; the committee at this time has no other witness to examine, and is, I think, ready to make its report, practically.

But the thing which appeared to me to be necessary was the entire disassociation of the actual proof of the charges from this alleged contempt, because I feel that it is not alone due to the House of Representatives, but it is due to Mr. Marshall, and I feel that I am broad enough to make such a report that despite this letter, if in my mind the truth of these charges of impeachment is not proven by the evidence produced by the impeaching man, Mr. Buchanan, for one, I shall have hesitancy in saying so, and I feel, therefore, that it is not alone a matter which affects the rights of the House, but affects these rights of Mr. Marshall, that these matters be considered independently with regard to what we all ultimately accomplish, and that is the administration of justice on the floor of the House and in the office of the district attorney of the southern district of New York.

Mr. STERLING. Does Mr. Marshall understand from the committee that he could be heard at any time in his own behalf, that he could have witnesses there?

Mr. GARD. I do not know that that matter was given to him in the shape of any writing. The only communication, as I said, that we had personally with Mr. Marshall was this, that when he came, and in response to our inquiry that he do come, we told him of these charges, and my recollection is that we told him that he was entirely welcome to be present at any time, either himself or by his attorney. This was entirely an executive session, as I have said to you. What he said, as Mr. Nelson has explained, when he showed him the records—we had them contained in the record—said he had never read them; said he did not care anything about them. We asked him whether he wanted to read them. He said, "If you want me to read them, send them down to my office." We later prevailed on him to take them with him, and he did take them, and retained them a short time, and he returned them with a statement that what the committee had said that Mr. Buchanan had made the charge that these indictments were returned without evidence, was a creation in the minds of the

committee; that his interpretation and construction of the charges warranted no such construction, and if, he said, the committee had assumed that construction based entirely upon the statement of Mr. Buchanan, that he was not guilty of the charge for which he had been indicted.

We said to him that he could be present in person or by counsel, and he rather vehemently protested that he did not know what the charges were; that he did not want to read them; that he did not want to have anything to do with any of the proceedings.

That is what I referred to when I spoke of what seemed to me was the unfortunate attitude which Mr. Marshall had against this committee when the committee was, if anything friendly to him.

Mr. MOON. Is there anything further you wish to ask Mr. Gard?

Mr. GARD. Mr. Nelson is here.

STATEMENT OF HON. JOHN M. NELSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN.

Mr. NELSON. Mr. Chairman and gentlemen of the committee, I suppose that Mr. Webb, our chairman, and Mr. Gard have gone over this matter, both facts and the law in the case, and I am sure I do not want to weary you.

I simply desire to say that anything that Mr. Marshall has done has not influenced my attitude toward him at all. The only reason why the committee, so far as I know, reported to the Subjudiciary Committee was that it was so public, it was so far-reaching in its effect, it seemed to me that we could not ignore it; it was our duty to report it to the Judiciary Committee, and this committee thought it was its duty to report it to the House.

You see, the fundamental thing here is after all not anything personal, but it goes right to the highest prerogatives of the people. This impeachment, as I understand it, is the highest power of the people to preserve free government. It is the only way the people have of restraining encroachment of power, either in the executive or or in the judicial departments.

I want to say to you gentlemen of this committee, if you have any thought that this gentleman [Mr. Marshall] has not any power, you go over there and you will be astonished, I believe—I know I was—at the power of that office. He has 27 assistants in the most populous city of the land, using subpœnas and indictments, and conspiracy charges and other agencies of government in the way of secret service, in a manner that was simply overwhelming, reaching out to get common people, citizens and lawyers and ex-Members of Congress and Members of Congress—I do not want to go into the facts of the case because we have not determined that—but surely, outside of everything else, it has been a very interesting study to see the power of this office.

Now, that being a matter of high prerogative of the people, and the House having taken jurisdiction of it, we exercising judicial functions, there is no mistake about that, we were not there in a representative capacity, not there in an administrative capacity, and the courts have uniformly, you will notice when you read the precedents, held that we were exercising judicial functions; we were in a judicial capacity; we were the grand inquisitors of the Nation, partly judicial,

partly acting as grand jurors, and it was direct contempt of the committee. I perhaps will withdraw that; I mean withdraw it so far as the statement that it was contempt. I do not wish at all to suggest whether it was contempt or not. That is for this committee to say. I am here to answer the facts, and if you wish to have the benefit of the discussions or the information that we developed in the Judiciary Committee along what lines to look in the way of the judicial precedents and parliamentary practices. I have had occasion to study this thing from various angles, but so far as concluding as to the facts, whether they constitute contempt or not, I would not suggest anything.

If there is any question you gentlemen wish to ask I should be very glad to have you ask it.

Mr. STERLING. Mr. Chairman, I should like to ask Judge Nelson a question.

Mr. MOON. You may ask it.

Mr. STERLING. Just to bring out this thought before our committee without intimating what conclusion the committee might reach as to whether there has been violation of the privilege of the House or not, for I have not reached any conclusion.

But, say this committee should reach that conclusion, and reach the opinion that they should recommend to the House that Mr. Marshall be summoned before the House for breach of this privilege, as a question of policy or propriety, do you think that should be done prior to your committee reaching a conclusion as to whether they should prefer impeachment charges or not? In other words, if the House should bring him up and attempt to deal with him for contempt before you make a report, will the country take that as tending to prejudice the Judiciary Committee against him before they make a report on the charges out of which this alleged contempt proceeding grew? I want to get your idea and bring that out before the committee.

Mr. NELSON. We have carefully considered that point, both in the subcommittee and in the full committee, and we have come to the conclusion that it being a distinct, separate matter, a separate matter entirely, his attack upon the House, that we should not like to impeach a man for that. It may possibly go in the case, I do not say.

Mr. CRISP. It would certainly not be within your jurisdiction to take cognizance of that?

Mr. NELSON. I should not think so. On that question we have not passed. But this is an offense, if it is an offense at all, against the House itself, the committee of the House, the individual Members—if you will investigate you will find that section 6 of Article I covers this, as well as physical assault in the Sims-Glover case, and it is also the question of the rights of witnesses.

They were told they were rogues and rascals. It is a question also of the right of an impeaching Member of the House, who is in attendance upon a committee, who is said to be a criminal and a traitor, and all that—these things are all involved.

Now, we believe that this is a distinct matter; that it should not be confused with the other. We may find that he is not guilty of the impeachment charges, but we may also find that he is. We have not concluded. We are still investigating carefully. It seems to us that there should be no confusion; that this should be brought to

the attention of the House, and that it should settle this matter by itself, and then we go right on as if nothing further had occurred in a fair and impartial way to ascertain the other things to report; that it is not well to confuse the two.

Mr. CRISP. I agree with you that it is an entirely separate and distinct proposition, but my question was whether you thought you should make a report on this distinct proposition before you had made a report on your other distinct proposition.

Mr. NELSON. We are unanimous, practically, now. We were unanimous in the subcommittee and also in the full committee that it ought to stand out distinctly.

Mr. GARD. I think some of the things that Mr. Marshall has said, notably this part here where he says that he regarded a Member of Congress who would take money for an unlawful purpose from any foreign agent as a traitor, I think that is true. I would not put myself in a position, as a member of this subcommittee, to attempt to impede justice in any way, and that if this subcommittee or that if this special committee thinks there should be any deferring of your report until we can make our report, that is a matter entirely indifferent to me. The only thing in my mind is this, as Mr. Nelson has said, in an attack upon the House of Representatives, directly addressed to a subcommittee, it is true, but relating to the conduct of the whole House, from the inception of these charges made against Mr. Marshall by Mr. Buchanan. That is, as I think, we all agree.

Now there was some disagreement of opinion, I am frank to say, but I think there is practically unanimous expression in the entire Judiciary Committee now, that these are separate and independent charges; that the charge of contempt should not be associated with the charge of proven guilt on the impeachment charges, and I go so far as to say that this letter, while it is surely an impertinence and may be a contempt—I am not passing on the question of contempt—was not such that we could base a charge of impeachment on. I would no attempt to bring that before the committee.

I simply want the committee to understand my own personal attitude in this matter, that my attitude is not as appearing here today to inform you (as I have thought to inform you honestly and impartially), it is not any attempt to impede or even delay justice, because I believe, and I think every one who considers the matter honestly, likewise believes that if this charge, this indictment against Mr. Buchanan and Mr, Lamar and Von Rintelin and others is returned, was returned after evidence sufficient to indict, and it is a case which should be tried. I firmly believe the district attorney should try the case without being impeded or sought to be impeded by any action of Congress. That the administration of justice would necessarily demand (this is a serious case against Mr. Buchanan), and I would not knowingly do anything to impede the proper presentation of that case to the jury.

Mr. LENROOT. This resolution, Mr. Gard, compels this committee to report not later than the 14th of April.

Mr. GARD. Yes; I understand that.

Mr. LENROOT. Was it the purpose of the committee in putting that in to secure action by Congress in this matter in advance of the other?

Mr. GARD. There was no such purpose.

Mr. NELSON. They can make the report and let it lie, but we simply followed a precedent. We were limited to five days in the Glover-Sims case, and it seems to be desirable that these things should not drag.

Mr. CRISP. I think if the committee desired longer than that, I am sure the House, on the request of our chairman, would wait longer.

Mr. MOON. It seems to me that this committee, and the other committee, are composed of sensible people. I do not see any reason why we should delay this matter any more than a court should delay a case on account of a motion pending in that case.

Mr. STERLING. Is it your idea that we should give Mr. Marshall an opportunity to be heard before this committee?

Mr. MOON. I have not thought of that matter; I would think we are sitting somewhat as a grand jury in this matter. Let Mr. Marshall be heard before the House.

Mr. LENROOT. That goes again to the form of this resolution. This form of resolution seems to delegate the matter entirely to this committee.

Mr. CARLIN. When you are through with the questions I should like to make a personal statement, not to go into the record.

Mr. STERLING. What do you gentlemen think about that, if Mr. Marshall cares to be heard here?

Mr. NELSON. So far as I am concerned, I shall have no objection at all.

Mr. CARLIN. Nor as far as I am concerned.

Mr. NELSON. Here is the situation. I am absolutely conscious of honestly trying to discharge my duty, and in the exercise of that duty—in the way we are challenged, the motives of the House, upon faith I can show you the newspaper headings, all of them charging upon faith that the Congress and the House are trying to shield criminals, and all these things.

Mr. STERLING. I do not think, Mr. Chairman, that the House expects us to report an ex parte matter here at all. The House will not want to hear evidence in a contempt case. The House will want us to hear all the evidence to be heard, I think, and make our report.

Mr. WEBB. We have no objection at all.

Mr. MOON. Under the terms of the resolution we are to find if any of the privileges of the House have been violated; then to find whether that was contempt or not, and then determine the procedure. I think those are the three things we are obliged to do. I surely have no objection to hearing Mr. Marshall so far as I am concerned.

Mr. STERLING. Suppose this were before a court; suppose it were for contempt that occurred outside of the court. The court would have the right to refer the matter to a commissioner to take the testimony on the contempt, and of course the court would want to know all the facts of the case, both sides of it, before he would pass on the question of contempt.

Mr. GARD. It was our thought that the facts were established by this letter. We associated also the additional letter which came to Mr. Webb, the chairman of the Judiciary Committee, but we thought the facts, in so far as the actual charge of contempt at least were presented—I will not say established—but presented as contained in the letter.

Mr. STERLING. I think that is true; but suppose Mr. Marshall came down here and undertook to justify some of the statements? Do you mean to say it would be contempt if he could justify them? Suppose he wanted that opportunity?

Mr. WEBB. I see no objection in the world to it.

Mr. NELSON. Of course, it is customary to let him be heard before the bar of the House. I do not know of any precedent where they have had a prior hearing.

Mr. LENROOT. This resolution seems to delegate that full power of investigation to this committee.

Mr. WEBB. I think, speaking for both the full committee——

Mr. MOON (interposing). This evidently contemplates a hearing before the House, of course, because we are to determine the power of the House to punish for contempt, and the procedure.

Mr. GARNER. In reading his letter the question of contempt, it seems to me, is embraced in this letter—whether or not the statements in this letter reflect on the House of Representatives through its delegated committee; and, if it does, that fact alone would be conclusive. Mr. Marshall could not take anything back he said in his letter—in fact, he has confirmed it in the letter to the committee itself. Now, the question of the statements made in this letter—do they come within the purview of contempt of the House of Representatives?

Mr. WEBB. Mr. Carlin is present now.

Mr. MOON. We shall be glad to hear Mr. Carlin.

STATEMENT OF HON. CHARLES C. CARLIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA.

Mr. CARLIN. Mr. Chairman and gentlemen, I shall be very glad to tell the committee what it wants to know, but I have no statement to make.

I think this committee ought to be left free and unhampered by the other committee in relation to this matter. I only came because I understand that perhaps you might want to ask me questions.

Mr. MOON. You received the letter referred to in this resolution, did you, as the chairman of the Subcommittee on the Judiciary?

Mr. CARLIN. Yes, sir; I did.

Mr. STERLING. Did you see it in the newspaper before you got the original letter?

Mr. CARLIN. It must have been published before I got it. These are the circumstances under which I got it: I was to leave New York on the 3.50 train. I was packing my valise at the hotel, probably within a few minutes of 3 o'clock. It may have been the 3.30 train; I may be mistaken as to the hour.

At a few minutes of three I was called to the telephone and asked if I was Congressman Carlin. I said I was. The voice stated that Mr. Marshall would like to know when I was going to leave the city. I asked who I was talking to. He said he declined to tell me. I said, "It can not be that Mr. Marshall has asked somebody to talk to me unwilling to give his name." "Well," he said, "I will not give my name." I said, "I will be hanged if you will find out when I am going to leave the city," and I hung up the telephone. In a

few moments I decided to verify the statement as to whether this gentleman was talking for Mr. Marshall, and I called up Mr. Marshall's office myself. I got his secretary. He said his name was Richards, I believe. I told him what happened over the telephone, and asked him if Mr. Marshall had tried to reach me in that way. He said he could not say; did not know anything about it; but he did know Mr. Marshall had a letter for me and wanted to communicate with me. I said, "If he does, I will wait here until I receive it."

I hung up the phone, and in a few minutes the phone rang and a representative of the New York World was on the other end of the wire and wanted to know what I had to say about Mr. Marshall's reply to me. I told him I had not received it. "Well," he said, "you will receive it." He went on to tell me what it contained. I said, "I have not received any letter and do not care to give you any statement." I told him that when I did receive the letter I should be very glad to make a statement, although I could not make it for the committee as they had separated. I hung up the phone. I had three or four other newspaper reporters, as soon as they could reach me, call up for interviews. I could not give them interviews because I had not received the letter. When the letter did arrive there were newspaper reporters waiting in the hall and in the lobby, and I think one had gotten into my room.

Mr. GARD. How did you get the letter?

Mr. CARLIN. A messenger boy brought the letter, and as I went away leaving for the train—I am not sure whether I read the article in the paper, his letter to me in the paper, but I think I read on the train not only his letter but things I had said about it and things I had not said about it.

In the last line of his letter he informed me it would be given to the press. But it was an insolent way of communicating with me through a messenger or friend who was unwilling to give me his name, and I was unwilling to believe that Mr. Marshall would adopt that way of communicating with me. I am not sure now that he did, but I tell you what happened to me.

Mr. MOON. Is there anything further, gentlemen?

Mr. CARLIN. I have not anything further.

(Thereupon, at 1.30 o'clock p. m., the committee adjourned until Monday, April 10, 1916, at 10 o'clock a. m.)

MONDAY, APRIL 10, 1916.

The special committee this day met, Hon. John A. Moon (chairman) presiding.

The CHAIRMAN. Mr. Marshall, the special committee having under consideration the charges against you met last Friday and we took the testimony or heard the statements of Mr. Chairman Webb, of the Judiciary Committee, and Messrs. Carlin, Nelson, and Gard. Then the committee sent an invitation to you to be here to-day, which you telegraphed you would accept. In the meantime, we have had prepared the statements made by those gentlemen with reference to the letter which you wrote to the subcommittee of the Judiciary Committee in New York. There is a copy of their state-

ments. I take it that it is the sense of the committee that they are entirely willing for you to ask those witnesses any questions you desire.

Mr. LENROOT. I think if Mr. Marshall desires that opportunity, it should be afforded him.

Mr. MARSHALL. I should like to have an opportunity to read over these statements.

The CHAIRMAN. You can read over those statements and then the gentlemen will come back and you can ask them any questions that you desire. The committee is more than anxious to have the full facts on both sides. Mr. Marshall can make a statement now, if he desires, and if, after reading over the testimony, he desires to ask the Congressmen any questions, we will bring them before the committee for the purpose.

Mr. MARSHALL. Perhaps, Mr. Chairman, that would be the best course. I have come here pursuant to your letter of April 7, 1916, which, I suppose, is a part of your record. I telegraphed at once that it would give me pleasure to come and appear before you. I prepared a statement which I have brought with me and which I should like to submit in writing. I must apologize for its form. I did not receive your letter until about 11 o'clock Saturday morning and I had rather a short time to get it in shape, but I suppose that it will be printed anyhow, and if I may do so, I will submit it.

Mr. STERLING. As the chairman has stated, the members of the subcommittee and also Mr. Webb, the chairman of the Judiciary Committee, made statements to this committee on Friday when you were not present, and you do not know what was said. Would you prefer to read their statements before you submit your statement to the committee or make any further statement to the committee?

Mr. MARSHALL. I will do whatever the committee desires to have done in that regard. That might be a good suggestion.

Mr. STERLING. It might be that after you have read the statements which those gentlemen made that they may affect your views with reference to the matter that is pending here.

Mr. MARSHALL. That is possible. I will take any step you desire.

Mr. STERLING. I presume the committee in that regard will do whatever you desire.

The CHAIRMAN. Whatever is Mr. Marshall's preference.

Mr. LENROOT. The committee will do whatever Mr. Marshall desires.

Mr. MARSHALL. I have no choice, because I do not know what is in the statements. I will have to leave that to the committee.

The CHAIRMAN. I should think that you would probably want to read the statements of the witnesses before you proceed very far.

Mr. MARSHALL. May I read the statements now?

The CHAIRMAN. Yes, sir.

Mr. CRISP. As I understand the suggestion of Mr. Sterling, it is that Mr. Marshall be given an opportunity to read that evidence before he submits his statement.

The CHAIRMAN. Mr. Marshall's statement will be withdrawn, as there is no reason for us to read it now.

(Thereupon the committee took a recess until 1.30 o'clock p. m.)

AFTER RECESS.

At the expiration of the recess the committee resumed its session.

STATEMENT OF MR. H. SNOWDEN MARSHALL, UNITED STATES ATTORNEY, NEW YORK, N. Y.

The CHAIRMAN. Mr. Marshall, you may proceed with your statement.

Mr. MARSHALL. I have had an opportunity to go over the minutes which you gave me this morning of the former proceeding before the committee, and I desire to submit the statement that I offered this morning and withheld pending the reading of these minutes.

The CHAIRMAN. Do you want to submit your statement or read it?

Mr. MARSHALL. No, sir; I will just submit it. It will be easier for you to read it than for me to read it to you.

The CHAIRMAN. Suppose you read your statement and then make such other statement as you desire, and we will proceed in that way.

Mr. MARSHALL. Just as you say, Mr. Chairman. [Reading:]

To the Hon. John A. Moon, Chairman, and Select Committee appointed under House resolution 193:

GENTLEMEN: I wish to respectfully submit for your consideration the following statement:

I respectfully but most earnestly protest that I am not in contempt of this House, or of its committee. Undoubtedly the House has the power to consider the question whether a charge against some public officer shall develop into an impeachment of him by the House. In discharge of that function the House, or such committee as it may instruct has the fullest power to summon witnesses, call for the production of papers and require answers to the questions it may be necessary to put to the witnesses. With the exercise of these functions no one should interfere.

Now I have not refused to appear before the committee or the subcommittee, nor have I advised any one so to do, or suggested to any one that he should avoid or evade service of subpœna. I have refused to answer no question, I have failed to produce no document and have not advised or suggested to any one else that he should so refuse or fail to produce—except that in compliance with express instructions of the Attorney General and in conformity with the well settled practice of the Federal courts in the second circuit, I have instructed my assistants not to produce before the committee the original or any copy of the stenographic minutes of testimony taken by the grand jury, and not to testify as to any evidence which was heard by that body at any of its sessions.

Nothing that I have done or said has in the slightest degree delayed, or embarrassed, or interfered with the conduct of the investigation above referred to by this honorable House or by its Judiciary Committee or by its subcommittee.

For these reasons, therefore, I protest that I have been guilty of no contempt of the House of Representatives.

To understand the situation in this matter a preliminary statement of the facts should be made:

The grand jury in the southern district of New York, impaneled in September, 1915, was continued from term to term until December,

and toward the end of December handed down an indictment against Rintelin, Buchanan, Lamar, and others, charging them with a violation of the Sherman law.

This grand jury summoned a large number of witnesses for the early part of December, and the fact that witnesses were being examined, and that an investigation was being made into the activities of the Labors National Peace Council, of which Mr. Buchanan had been president, became public property.

Shortly after this fact become known, and on December 14, 1915, Mr. Buchanan made a motion for my impeachment on six separate grounds, none of which contained any specifications, and all of which were stated in the most general terms. The most specific statement which he made was that I had violated the "eight-hour laws of the United States and of the State of New York." This proposed resolution, on Mr. Buchanan's motion, was referred to the Judiciary Committee, and I understand that Mr. Buchanan was called on by this committee a number of times for specifications, which he did not give.

I regarded this motion made by Mr. Buchanan as a threat to me and intended to deter me from proceeding with the investigation which he then knew was in progress. I totally disregarded the threat and proceeded with the investigation. It was entirely clear to me that there was no reason on earth that would interest Mr. Buchanan, of Illinois, in the administration of the office of the district attorney in the southern district of New York excepting his personal interest in preventing a thorough investigation into his own conduct by the grand jury in this district.

Thereafter, as above stated, the whole case was submitted to the grand jury for its vote, which resulted in the indictment of Mr. Buchanan on the 28th day of December, 1915. He appeared and pleaded not guilty to the indictment on January 5, 1916.

On January 11, 1916, Mr. Buchanan offered a resolution amending his impeachment charges and introducing a resolution directing the Committee on the Judiciary to inquire into whether the action of the House was requisite concerning my alleged misconduct. These impeachment charges were very voluminous but wholly indefinite and lacking in any specification that would enable anybody to find out what I was charged with doing. After some debate, this resolution was withdrawn.

On January 12, 1916, it seems that Mr. Buchanan moved again for my impeachment, setting forth a long list of charges, none of which, so far as I can make out, contain any specifications, and introduced a resolution that the Committee on the Judiciary be directed to inquire into the charges.

I have said that Mr. Buchanan's resolution contained charges against me. I think it would be more proper to say that he filed a few pages of abuse which could not by the greatest stretch of the imagination be called charges. After he had been indicted and called on to plead, he increased the volume of his abuse considerably, but I do not think that anyone who reads the charges will be able to understand any particular act of wrongdoing with which I was charged.

When Mr. Buchanan presented his final so-called resolutions of impeachment in the House on January 12, 1916, there was an extended debate in which a number of the Members took part.

Several Members asked for some specification of the charges, and a number of them suggested that some facts ought to be made known on which a charge should be based. I have examined the Congressional Record of January 12, 1916, and do not find that Mr. Buchanan answered any of those questions. On the contrary, his statement was that he had not the resources to secure information which he honestly and sincerely believed could be obtained if authority was given. The outcome of the debate accordingly was that the indicted Congressman secured a reference of a case in regard to which he offered no evidence except what he described as his "honest and sincere belief," and this "honest and sincere belief," which was not subjected to any very severe cross-examination, set in motion the proceedings which have since followed.

Thereafter, and on January 27, an additional resolution was submitted by the chairman of the Judiciary Committee empowering the Committee on the Judiciary or any subcommittee which they might appoint to subpœna witnesses, employ stenographers, and incur any expense necessary to investigate the question involved in the resolution of Mr. Buchanan. The questions involved were whether or not there was any legal evidence that could be adduced to support his "honest and sincere belief" that the district attorney who had happened to be in office in the district where he had been indicted was guilty of some 42 charges of misconduct. Up to this date, as far as I am advised, no Member of Congress had had placed before him any fact except the "honest and sincere belief" of their indicted fellow Member.

As these events progressed I paid little attention to them. I have been able to state the facts accurately, because I have obtained for the purposes of this statement the copies of the Congressional Record in which the events are narrated. The whole thing, when it first occurred, seemed to me to be a desperate effort to postpone the trial of Mr. Buchanan by putting pressure on the district attorney.

I proceeded with the preparation of the trial of the case of Mr. Buchanan and from time to time I heard that witnesses were being subpoenaed before the Judiciary Committee, or, perhaps, the subcommittee in charge of this matter, I don't remember which. The subcommittee or the committee was, according to my information, during this period, holding so-called secret sessions. I was informed and believed that everybody who appeared before the said committee came back and stated with some surprise that in the secret sessions Mr. Buchanan was always present and that there was usually present at the secret sessions of the committee a lawyer of this city of the name of David Slade, who is at present under indictment in this district and also under charges of having altered a filed bill of exceptions after the trial judge had certified to and signed it, preferred against him to the bar association by the United States district judges in this district. This news surprised me considerably, but I paid very little attention to the whole occurrence, as I never took it very seriously except as a confirmation of the testimony which had convinced me that the indictment of Mr. Buchanan was justified.

Shortly before the week beginning February 27, I learned to my surprise that the committee was coming to New York, and one of my assistants stated to me that he had received a telephone message from one of the members of the grand jury which had indicted Mr.

Buchanan, and that this member of the grand jury had stated that he had been subpœnaed to appear before the subcommittee of the Judiciary Committee in New York on Monday, February 28. My assistant further stated to me that this member of the grand jury had stated that as he understood his duty, he was not at liberty to tell the subcommittee anything which had transpired in the grand jury room, and asked for information. My assistant told me that he requested the juror to await further advices and reported the event to me.

On Saturday, February 26, I was in Washington and told the Attorney General of this occurrence, and asked what he thought should be done about the matter. I explained to him that if this subcommittee, in its supposed investigation into my conduct, was really going to attempt to examine the grand jurors, some step should be taken to prevent such a performance on their part. He told me that he would look into the matter, and on Sunday morning, before I left Washington, he telephoned me and explained to me that Mr. Carlin, the chairman of the subcommittee, had promised him that no effort would be made by the subcommittee while in New York to intrude into the secrets of the grand jury room.

Relying on the promise which, as I was thus informed, Mr. Carlin had made to the Attorney General, I did not take the steps which I should otherwise have taken to prevent the subcommittee from taking the course of conduct which they afterwards saw fit to take.

On Monday, February 28, I was informed that the subcommittee had arrived in New York and had started public hearings, and that they were examining members of the grand jury which had indicted Mr. Buchanan. I am not to be charged with neglect in failing to prevent this misconduct on the part of the subcommittee, because I relied on the explicit promise which, as I had been informed, Mr. Carlin had made to the Attorney General that such an examination of the grand jurors would not be made.

I was greatly amazed at this first action of the subcommittee. I ascertained that they had thrown their hearings open to the public, and I was called on by a number of newspaper reporters to find out whether any charges had been served on me or whether I was under any charges. I told the newspaper reporters that so far as I knew I was not under any charges, that no charges had been served on me, and that I knew of no charges except that I had read of a resolution which Mr. Buchanan had introduced in the House, in which he made a number of unpleasant statements about me.

From Monday, February 28, to the end of that week the subcommittee continued its hearings. The proceedings of the subcommittee, with the exception of so-called executive sessions, have been printed, and what occurred before the committee appears in the printed record.

From the beginning of these proceedings to the end the subcommittee omitted no opportunity to act in what seemed to me and others an insulting manner to me and to my assistants.

On the afternoon of Monday, February 28, while I was busy in my office, the subcommittee sent the Sergeant at Arms of the House to bring me before the subcommittee. I asked to be excused, and asked for some notice if the subcommittee wished to see me, but the Sergeant at Arms was insistent, and in order to avoid a scene I went with him before the subcommittee. I was not given the ordinary subpœna

which was given to other witnesses, but the Sergeant at Arms insisted on my immediate appearance before the said subcommittee, and I accordingly appeared.

When I appeared before the subcommittee I was told that the subcommittee desired to see the minutes of the grand jury in the Buchanan case, and also the minutes in the case of one Rae Tanzer and the Slades. I was told that Mr. Buchanan had stated that he was not guilty of the charge of which the grand jury had indicted him, and therefore he had charged me with having indicted him without evidence. I was told that it was also stated that in the Rae Tanzer case and in the Slade case there was no evidence to justify an indictment, and that the subcommittee desired to examine the grand jury minutes in those cases to ascertain whether the charge was true that the Slades and Rae Tanzer had been indicted without evidence. I was asked if I knew about the charges against me, and replied that I did not. I did not understand that the subcommittee in speaking of "charges" referred to the speech which Mr. Buchanan had made in the House of Representatives on Wednesday, January 12, 1916, but supposed that they must have reference to some definite or specific charges which I thought he might have subsequently made. I was then handed a copy of the Congressional Record of the date last named, which I carried away with me.

I stated to the subcommittee that they could satisfy themselves completely as to whether there was evidence upon which Mr. Buchanan should be indicted by asking him one question, namely, where the money came from which financed the activity of Labors National Peace Council, of which he had been president; and how that money had been spent. I said that if they would require an answer to that question, they need not ask me any questions as to what the evidence was against Mr. Buchanan. The chairman of the subcommittee stated to me that Mr. Buchanan had denied that there was any money used by the Labors National Peace Council except a couple of thousand dollars, and that Mr. Buchanan had stated that he (Buchanan) had personally paid his own expenses in connection with the matter. I asked when Mr. Buchanan had made that statement, and Mr. Carlin replied that he had made it in a public speech.

I told the committee that I would prefer not to answer their request for the grand jury minutes until I had communicated with the Attorney General, and told them that I had had a talk on the subject with the Attorney General. The chairman of the subcommittee told me that he hoped that neither the Attorney General nor I would press an objection to their seeing the minutes of the grand jury in those cases, and said that the minutes, if they should be turned over to them, would be examined in confidence by the subcommittee, so that they (the subcommittee) could determine whether in their opinion there was evidence sufficient to indict the persons who had been indicted.

In the course of this interview the chairman of the subcommittee explained to me that I had not been invited to appear before the subcommittee and had not asked for leave to appear, to which statement I assented, and asked them also to note that my appearance on the occasion in question was at their request and not my own, to which the subcommittee assented.

At the time when I appeared before the subcommittee they had established themselves in quarters in the Federal building in the city of New York and had accompanying them Mr. Buchanan, although, so far as I know, Mr. Buchanan was not present at the executive session to which I was summoned. I was informed also that in practically all their hearings they were attended by David Slade and also by a Mr. Walsh, who, as I am informed, was counsel for Mr. Buchanan. I observe from the printed minutes of the subcommittee that Mr. Walsh is described as counsel for the subcommittee, and in the minutes he stated that he was counsel for Mr. Buchanan.

On Wednesday, March 1, I advised the subcommittee in a letter which I then caused to be delivered to them that I would respectfully decline to give them the grand jury minutes which they had asked me to produce. In this letter I quoted a telegram of instructions to me from the Attorney General, in which he stated that I must respectfully decline to produce these minutes, and stated that Federal grand juries are part of the machinery of the Federal courts and by long-established practice the Department of Justice and district attorneys are bound not to disclose testimony and other proceedings had before grand juries except upon order of court. In this telegram the Attorney General stated further that in the present case both the Department of Justice and the State Department were of opinion that a disclosure of the proceedings before the grand jury would be prejudicial to the public interests.

In the letter in which I transmitted this telegram to the subcommittee I stated that I was personally in entire accord with the views of the Attorney General, and stated further that I was in possession of the minutes for which they had asked, and would appear before the subcommittee and make a record of my refusal to produce the minutes so that the subcommittee could take such action in regard to the matter as they might be advised, in case they wished to test their right to examine these minutes of the grand jury.

In my letter to the chairman of the subcommittee, dated March 4, 1916, I have summarized my views of the conduct of the subcommittee during their visit in New York. There was no assistant of mine called before them who was not subjected to indignity and insult. For instance, Mr. Roger Wood, who was engaged in the trial of an important case, was called before the subcommittee after he had finished his speech to the jury and while the jury in his case was out and subjected to a violent and abusive cross-examination by the subcommittee. I was told by a reporter connected with the New York Tribune that if I desired testimony as to the general manner of the subcommittee I could call on him, as he had just heard the examination of Mr. Wood. He said that he had never heard a "pimp" in a white-slave case subjected to the kind of treatment that Mr. Wood had to submit to at the hands of the subcommittee.

This proceeding, which was ostensibly an investigation of the conduct of an officer of the Department of Justice, was so conducted that no one was notified, summoned, or assigned to represent such officer. No counsel was present to object to any question, whether propounded by a member of the subcommittee or by counsel for Mr. Buchanan; no one was present to call upon the committee to repress the exuberance of any witness who might wander off into hearsay or con-

jecture. The consequence was that not infrequently when a question was put to a witness the result was what happens when a stone is thrown into certain pools in the Yellowstone Park—immediately there spouts up a geyser which scatters liquid mud over a wide area. Naturally in a public hearing so conducted the representatives of the press gather out of the spray whatever may be most derogatory to the officer investigated, since that only makes an interesting story for the readers of their papers.

One of the main purposes of the subcommittee seemed to be to indicate to the public that I was trying to conceal facts on account of my fear of consequences personal to myself.

After they received my letter in which I refused to produce the grand jury minutes and stated that I was under instructions not to do so, the subcommittee called one of my assistants who had been in charge of the grand jury investigation against Mr. Buchanan, and demanded of him the production of the grand jury minutes in the Buchanan case. He respectfully refused to produce the minutes and they thereupon asked him whether his refusal was due to orders which he had received from me. They never disclosed publicly the fact that they then well knew that I was under orders not to give them the minutes, but they deliberately endeavored to create a public impression that I was instructing my assistant to withhold the minutes from them for my own protection.

In the course of the examination of a witness one of the members of the subcommittee asked him how much money he had paid to one of my assistants in connection with a certain case, and how much money he expected to pay him. The astonished witness stated that he had paid no money and expected to pay none. One of the newspaper men asked this member of the subcommittee if he had any foundation for this question, and the member said that he had no foundation and that it was merely a "fishing question."

It is not an unreasonable presumption that the object of the question was to have the newspapers the following day carry headlines such as "Hint of bribery in the district attorney's office," etc.

I might multiply instances of this sort indefinitely. The forms of questions asked by the different members of the subcommittee were as insulting to me and to my assistants as was the testimony of certain individuals who at one time or another had found themselves on the windy side of the criminal law whom they called before them.

Toward the end of their sojourn in New York the subcommittee called before them a newspaper reporter and interrogated him as to a statement which had appeared in his paper. They asked him whether the statement was based on information which he had received from me. They had never done me the honor of asking me whether I had given the newspaper reporter the information or not. The newspaper reporter declined to answer their questions and they attempted to commit him to jail. This was in line with the efforts which they had made to make it publicly appear that I was endeavoring to conceal the truth.

It was after this last performance on the part of the subcommittee that I wrote to them my letter of March 4, 1916, which is a part of the record which is now under consideration.

As to the propriety of my letter to Mr. Carlin of March 4, 1916, I have considered various arguments that have been suggested to

me. It has been said that the letter was disrespectful to the House of Representatives; it has been said that the subcommittee were sitting in a judicial capacity, and that I had no right to impugn their motives but was bound to wait until the end of their deliberations and then present such charges as I thought should be presented against the subcommittee; it has been said that the letter indicated a high state of indignation and was an imprudent and impolitic letter to write.

I have devoted considerable thought to the question of whether this subcommittee was sitting in a judicial capacity, because I would willingly agree that if such were the case it would have been improper for me to make the comments on their conduct which I made in my letter. I am convinced that they were not sitting in a judicial capacity in any sense of the word.

The House of Representatives has the right to investigate any public officer; it has the right to determine whether there are charges against that officer which should be submitted for determination to the court which is established by the Constitution, namely, the Senate. The House of Representatives has no more right to sit in judgment on a public officer than the public officer has to sit in judgment on the House of Representatives. The position of the investigating subcommittee of the House of Representatives toward a public officer is the same as that of a district attorney in regard to cases presented to him for investigation. It is the duty of the district attorney to investigate any case, and, if he is satisfied that a proper case is made out, to present the case to a court for trial. Precisely the same duty rests upon an investigating committee of the House of Representatives when it investigates the conduct of a public officer.

The mode of investigation in such cases is settled by ordinary rules of decency. A district attorney, until he is satisfied that a case is made out which should be presented to a court, is bound to protect the person under investigation from any undue publicity and scandal. If the district attorney starts out without knowing whether an indictment is going to be found or not and institutes a campaign of public newspaper defamation against the person under investigation, I have never heard it claimed that the object of such an attack is not entitled to answer the attack in the newspapers.

If an investigating congressional subcommittee, before it has ascertained whether charges are to be presented to the Senate, chooses to attack the officer under investigation in the public press and to make sneering and objectionable statements against him, and to heap every imaginable insult on him and his assistants, I know of no reason why the public officer should not be entitled to answer the attack in the forum selected by the subcommittee, and know of no reason why the attack should not be answered at the time when it is made.

In the case which I am now discussing the situation was most remarkable. The subcommittee had very frankly placed itself under the entire domination of an indicted Congressman. They permitted him to name their counsel, and then the subcommittee and the worthy counsel vied with each other in the selection of language toward my assistants and myself which I will not undertake to characterize. Any fair-minded man who reads the whole record can select the appropriate adjectives.

I am hardly going too far when I say that the public impression created by the subcommittee was that they had themselves appointed what may be called a sub-subcommittee, consisting of Messrs. Buchanan, Slade, and Walsh, and that this sub-subcommittee practically controlled the witnesses to be called and the methods to be used in examination.

I have had cases by the score where complaints have been made to me by persons whom I knew to have interested motives in making the complaints, which I have fully and carefully investigated. Dozens of such investigations have resulted in the conclusion that the case did not warrant prosecution. The fact that the investigation was under way has been practically unknown in the community, and I have not permitted the persons making the complaints to exploit their charges publicly until I knew that the cases were cases of real merit, in which the grand jury approved of an indictment.

If a district attorney should adopt the methods which were adopted by the subcommittee in this city, every man against whom an enemy saw fit to make a charge would be ruined, whether he should be indicted or not.

It has been said to me by half a dozen people that the subcommittee was endeavoring to give Mr. Buchanan a free rein, so that he could have no complaint about the nature and scope of the investigation. It has been suggested in supposed palliation for the methods of the subcommittee that Mr. Buchanan and his confrères, Messrs. Slade and Walsh, were allowed to do as they pleased, so that they could not thereafter criticize the subcommittee. To me this seems no palliation or excuse.

If the subcommittee abnegated their own powers and turned themselves over to be used by a couple of indicted men and a lawyer of one of them, then the motives of Mr. Buchanan became the motives of the subcommittee. I am convinced that neither Mr. Buchanan nor any of the persons making charges against me ever had the faintest notion that the charges were sustainable. Mr. Buchanan wished to drive me away from prosecuting him and his colleagues. The Slades wished to put an end to the indictment pending in this district against them. If this aggregation of indicted men found a subcommittee of the House of Representatives who were willing to turn over the whole machinery of what was described as an "investigation" to the purposes of the defense of United States *v.* Buchanan et al., and United States *v.* Slade, then the characterization of such a proceeding may, I think, be safely left to public opinion. The excuse that is made for the misconduct of the subcommittee is itself a damning indictment of their performances.

I had no misunderstanding about what was intended nor what was going on. The idea of the Buchanan-Slade combination was to destroy the usefulness of my office and to impede the cases pending against themselves. I find it difficult to escape the conviction that the subcommittee lent itself to their purposes and joined in their efforts to publicly malign and slander and defame myself and every one of my assistants who had had charge of any part of the prosecutions in which Mr. Buchanan and the Slades were interested.

I thought at the time that I wrote my letter, and I think now, that it was my duty publicly and immediately to answer in the press the public and scandalous attack which had been made on me and

my assistants through the medium of this so-called "investigating committee."

I do not deny that my letter of March 4, 1916, was written while I was in a state of intense and violent indignation at the treatment to which I and my assistants had been subjected. I have thought it over in cooler moments since writing it, and I find in it nothing to regret and nothing to retract. There is not a word in it which is not true. Under the same circumstances I should write the same letter again, and it is my honest opinion that any investigation by Congress should be rather into the actions of the subcommittee which sought to bring public disgrace upon my assistants and myself than into my own resentment of their methods.

This whole case is a novel and extraordinary one. There have been Members of Congress who have had to face the criminal courts, but there was never one before who resorted to defense by impeachment. I am not the only district attorney whose duty may require him to present to a grand jury charges against a Member of the House of Representatives. Mr. Buchanan is not the first Member of the House of Representatives who has violated the Federal law, and there may be other Members of that House who will find themselves in Mr. Buchanan's predicament.

I wish to present flatly and clearly to your attention the sinister and equivocal situation which is presented in this case. Defense by impeachment seems to be a novel one and one which is available only to a Congressman and to no other violator of the law. All that the indicted Congressman has to do, if the present precedent is to be sustained, is to rise in his seat and say that he "honestly and sincerely believes" that the district attorney in charge of his prosecution is guilty of every crime on the statute book; the indicted Congressman is not to be called upon for any specification beyond a statement from himself that he "honestly and sincerely believes" in the guilt of the prosecuting attorney. Of the indicted Congressman is willing to make such a general statement, and if the precedent in this case is to be followed hereafter, the path of a district attorney in whose district a Congressman is indicted is to be made a very thorny one. The "honest and sincere belief" of the indicted Congressman is to result in an expedition of fellow Congressmen to the district where the indictment is found, and all of the offscourings of the criminal courts where the district attorney has practiced are to be drawn together, not to substantiate charges against the district attorney, but to find out whether any charges can be drummed up.

Defense by impeachment, as I have said, is a novel defense. It is my unfortunate lot to take part in the first case of this character. At whatever discomfort to myself, it is my intention to see this case to the end. Surely the House of Representatives does not contemplate establishing the precedent that violators of the criminal law, if they happen to be Members, will find in it a "White Friars" or "Alsatia" which will be their sanctuary against prosecutors who seek to apply that law.

Unless the proposition which it is now sought to make a precedent be definitely and forever repudiated by the House of Representatives, I do not believe that there will be many prosecuting officers found who will have the temerity to perform their sworn duty and present an indictment against a Member of the House of Representatives. The tremendous discomforts for a district attorney which are

involved in this new defense by impeachment are a strong deterring influence to the prosecution of Federal crimes committed by any Member of the House of Representatives.

In the case in which we are now interested there is an added element. If a district attorney objects to the abuse and villification which he is to receive from a congressional committee when he performs his duty and if he protests with indignation against his treatment, he is to be hauled before the House for contempt.

Let me add to this a feature of the case to which I first adverted: An ordinary defendant who has not the advantage of belonging to the House of Representatives can not secure the minutes of the grand jury which indicted him except upon the order of the court. Under the novel practice which is now proposed a Member of the House of Representives who is indicted can, on the mere assertion of his innocence and after making an abusive speech about the district attorney who indicted him, have a committee appointed of which he is practically ex officio a member to examine the minutes of the grand jury and ascertain whether in the opinion of that committee the Member of Congress should have been indicted.

I have always realized that the extraordinary attack which the subcommittee made upon me and my office was not directed against me personally. I had the advantage of a slight acquaintance with one of the members of the subcommittee and did not know the others at all, and, so far as I know, there was no personal animus in the matter whatever. What has been done therefore raises a matter of principle vastly more important to the administration of justice in this country than any personal interest which I or anybody else can have in it. It must be determined before this proceeding is over whether a district attorney shall fear for his official life when he does his duty and presents charges against a Congressman, or whether the House of Representatives shall finally resolve to let justice take its course when one of their Members comes in conflict with the criminal law of the United States.

Respectfully submitted.

H. SNOWDEN MARSHALL.

APRIL 10, 1916.

Mr. MARSHALL. I wish to make a statement, Mr. Chairman, in regard to my former letter of March 4, which I wrote, and which you are now investigating. There have been statements made that it was intended to reflect on the whole House of Representatives or on the whole Judiciary Committee. Those statements, as I have explained in the letter to Mr. Webb, which is a part of the record, are unfounded, and I wish to say in regard to this statement that the same letter which I wrote to Mr. Webb applies to it. You could take a distorted sentence out of the statement and draw the inference that it was intended as a reflection on the House of Representatives, but it is nothing of the kind. It is my statement of my view about Mr. Buchanan and the subcommittee and the proceedings of the subcommittee in the city of New York. If anybody has any doubt about that, I should like to make it as clear as I possibly can. I feel perfectly confident that the conclusion that Congress will come to about this whole matter will be a correct and just one. I have a high respect for the House of Representatives, and do not think it

all inconsistent with that high respect to criticize the conduct of some Members of the House, as I have done in this case.

The CHAIRMAN. Is there anything further, Mr. Marshall?

Mr. MARSHALL. I have looked over this testimony which you gave me. I have only had about an hour to do it, because I have had to take up an urgent matter. I would be very much obliged to the committee if they would permit me to take it away and to send you a statement about some inaccuracies which I think are in this record.

The CHAIRMAN. Statements in the record?

Mr. MARSHALL. Yes, sir. I personally do not know about them, but in regard to which I think erroneous statements have been made. I could not do that to-day; but I can probably mail you by to-morrow afternoon or the day after a statement.

The CHAIRMAN. We have to report in a few days.

Mr. MARSHALL. I will have to forego any comments on it unless I can have the time.

Mr. GARNER. He could probably send it back by to-morrow.

The CHAIRMAN. We can bring those gentlemen here and give you an opportunity to cross-examine them?

Mr. MARSHALL. They are speaking of things that I do not personally know about.

Mr. STERLING. Have you read the evidence taken before the subcommittee?

Mr. MARSHALL. I have.

Mr. STERLING. Could you indicate to this committee some of the things of which you complain?

Mr. MARSHALL. Yes; I could. I am not prepared to do it in detail. I will give you one or two of them.

The CHAIRMAN. Before you proceed, I want to ask you one or two questions. You wrote the letter, I understand from your statement, of March 4, 1916, addressed to Mr. Carlin, chairman of the subcommittee in New York?

Mr. MARSHALL. Yes, sir.

The CHAIRMAN. You also wrote the letter to Mr. Webb, chairman of the committee, on March 10, 1916?

Mr. MARSHALL. I do not remember the date. I only wrote him one letter, and that is right, I have not any doubt.

Answering your question, if you will turn to page 253, you will find one of the things which I have alluded to as being wrong. There was a witness on the stand by the name of Anderson, and if you will look at the middle of the page, you will see the question by Mr. Gard:

How much did you pay Mr. Hershenstein for his services?

Mr. Hershenstein is an assistant of mine who was conducting a public case in which this witness was interested. You will see that Mr. Anderson replies in astonishment:

What did I what?

Mr. GARD. What did you pay Hershenstein for his services.

I suppose there must have been an answer beyond that.

Mr. ANDERSON. Up to the present I have not offered him any pay.

Mr. GARD. That is interesting. How much do you intend to offer him?

Mr. ANDERSON. That I intend to offer Mr. Hershenstein?

Mr. GARD. You said "Up to the present I have not offered him any pay." How much do you intend to offer him?

Mr. ANDERSON. I do not intend to offer Mr. Hershenstein anything. He has not asked me for a thing.

Mr. GARD. We are glad to know that. You said up to the present time you had not offered him anything.

Mr. ANDERSON. Did I state that? Well, I do not intend to offer him. He has not made any request for a cent from me.

Let me add something that I know by hearsay about the suggestion that my assistant was to be paid money in regard to a public case. Right after that—I get this by hearsay, but I can produce the witness, if needed—one of the newspaper men went to Mr. Gard and said "Did you have any foundation for that question?" And he said "No; it was just fishing." The following day Mr. Gard sent for the reporter of the Herald, as I am told, and said "Why don't you people on the newspapers treat us more fairly in New York?" The Herald man said "You want a frank answer to that question?" Mr. Gard said he did. He said, "Well, I understand, Mr. Gard, that you are a lawyer. You remember when I asked you about that question yesterday when you intimated that Mr. Marshall's assistant had been bribed and you told me that you had no foundation at all for that question, if a lawyer in any court that I know anything about should make an intimation of that sort the court would certainly reprove him and might disprove him. As long as you continue to run your investigation along lines like that the newspapers are likely to continue with you as they have." That is one thing.

The CHAIRMAN. That was hearsay?

Mr. MARSHALL. It was told to me and I believe it.

Mr. STERLING. Mr. Anderson was connected with the Bard and Keen case—was not that the name?

Mr. MARSHALL. There were two men, Keen and Bard.

Mr. STERLING. That is right. Well, one of your assistants did represent one of those film companies in a civil capacity?

Mr. MARSHALL. He represented none of the film companies.

Mr. STERLING. He represented the Colorado Film Co.?

Mr. MARSHALL. The company which had a claim against Keen and Bard, back in November. The film companies that made the complaint against Bard and Keen were California companies, of which Mr. Anderson was the representative.

Mr. STERLING. Mr. Smith was there representing the Colorado company or the Pike's Peak Co. Mr. A. M. or A. D. Smith, in a civil capacity?

Mr. MARSHALL. That was back in November. I will tell you exactly what occurred, if you will allow me.

Mr. STERLING. Certainly.

Mr. MARSHALL. There was a complaint against Bard and Keen for using the mails for a scheme to defraud. The complaint was made, as I recollect by Mr. Anderson, who represented some of their affiliated film producers in California. On Mr. Anderson's complaint Bard and Keen were arrested. They were represented by Mr. Henry Wise. He came to me and told me that they claimed that Mr. Rodger Wood had come to them in the autumn and had represented certain people who had civil claims against them. I immediately looked into it and found that the complaint was an entirely different matter and that the complaint from Anderson was an entirely different matter from the civil case in which Mr. Wood had been interested, but I said, inasmuch as he was one of my assistants, under all the circumtsances,

I would like to deal with the case with the greatest care; and I told Mr. Wise that I should like him to agree with me on some lawyer that he and I both knew and both respected, who could confer with me and decide whether it was or was not a proper ground of complaint under section 215 of the United States Criminal Code, the mail-fraud statute. Mr. Wise suggested that I confer with Mr. William L. Wemple, formerly assistant attorney. Mr. Wemple and I came to the conclusion that while there might be a case for the civil courts, the case was a pretty doubtful one under the mail-fraud statute for various reasons. I do not suppose that you care to be burdened with them.

Mr. STERLING. Then, Mr. Wood did represent somebody who had a claim against Bard and Keen?

Mr. MARSHALL. Yes, sir; I think in October or November.

Mr. STERLING. And he acted as attorney in that capacity?

I have read this record over carefully, except the last 25 pages which I have not yet been able to read. As soon as it developed that there would probably be criminal proceedings, Mr. Wood withdrew from that representation.

Mr. MARSHALL. I think he withdrew long before that.

Mr. STERLING. There was not a thing improper——

Mr. MARSHALL (interposing). He withdrew before there was any thought of criminal proceedings.

Mr. STERLING. It may be he did. I am willing to say that Mr. Wood acted with entire propriety, as far as this record shows. Mr. Gard, I think, had that in mind. Your office had acted as attorney in a civil matter for some of these people who had claims against Bard and Keen. I have no doubt if he had received pay for that it would have been perfectly proper and that, I think, Mr. Gard had in mind when he asked Mr. Hershenstein, another assistant of yours, whether or not he had been paid. I do not think you ought to impute to Mr. Gard any insult on his part. Mr. Gard is a man of very refined tastes, I think.

Mr. MARSHALL. I have never met him, except in connection with this case.

Mr. STERLING. That is the impression I have of Mr. Gard. When I read this it occurred to me that if the other matter had not been in this record about Mr. Wood, it would have occurred to me that Mr. Gard had gone beyond good ethics. But when I consider what had occurred with reference to both, Mr. Gard may have had in mind that Mr. Hershenstein had also represented these people in a similar capacity coming from the same office.

Mr. MARSHALL. The statement which was told to me was that it was merely a fishing question and had no foundation for it. That is what they said to me. There are one or two things I can do now——

Mr. STERLING (interposing). Can you turn to some other points in the record?

Mr. MARSHALL. I have a marked copy, and if you will permit me to do this more carefully, I will send it to you.

The CHAIRMAN. What time can you get that statement back; the day after to-morrow morning?

Mr. MARSHALL. I have got to get back to-night, and I could do that to-morrow, if necessary.

Mr. GARNER. We are limited to the 14th of April to make a report to the House. We are required to make a report on that date.

Mr. CRISP. I think in the interest of all concerned, if the members of the committee agree with me, if necessary, I will ask the House to extend the time 10 days, and to allow us 10 days longer in which to make our report.

The CHAIRMAN. We do not want to press you unnecessarily, Mr. Marshall.

Mr. MARSHALL. I am in a difficult position with several urgent cases in the circuit court of appeals, but I can manage to get this in, if it has to be done, but it will not be as complete as I would like to make it.

The CHAIRMAN. Is there anything you desire to say in reference to the letter?

Mr. MARSHALL. No; I have made my statement about the letter.

The CHAIRMAN. It is only something you want to say about the Buchanan matter?

Mr. MARSHALL. In reference to the statement made——

The CHAIRMAN (interposing). Made by the Congressman?

Mr. MARSHALL. By the Congressman; yes. I do not know whether it is of any importance, but on the question of whether an effort was made to imprison the newspaper reporter, I have here the statement of the United States marshal, and of the deputy United States marshal, to whom the prisoner was turned over.

The CHAIRMAN. You might leave that for the record.

Mr. STERLING. It does not appear in the record that the committee ordered the Sergeant at Arms to commit the prisoner to the United States marshal, and one of the members of the subcommittee stated to this committee that no such order had been made by the subcommittee.

Mr. MARSHALL. The statement of the United States marshal is that after his deputy had refused to receive the prisoner, the marshal was called before the committee, and they inquired why he refused to receive the prisoner, and demanded an explanation of that. I have here the statement of the marshal. The statements I have here are statements of United States Marshal McCarthy and United States Deputy Marshal McDonough.

(The statements referred to are as follows:)

STATEMENT MADE BY UNITED STATES MARSHAL MCCARTHY, MARCH 23, 1916.

On March 3, 1916, L. R. Holme, known to me to be a reporter engaged by the New York Times, was brought to my office in the custody of the Sergeant at Arms (Hon. Robert Gordon) of the House of Representatives, and my chief deputy was requested to place the said Holme in custody by the said Sergeant at Arms. My chief deputy refused to place him in custody and immediately thereafter recounted to me the fact of his refusal, and I agreed with him that he had acted properly.

Some few minutes thereafter I was notified that the subcommittee of the Judiciary Committee of the House of Representatives that was holding the hearing in the matter of the charges against H. Snowden Marshall, desired to see me, and I thereupon went to room 323 of the Post Office Building, said court room being used by the said subcommittee. At the hearing were Congressmen Carlin, Gard, and Nelson. Congressman Carlin, being the chairman of the said subcommittee, saw me as I came into the court room and beckoned to me to come up to him on the bench, which I did. We held a conversation (whispered) in which the following is practically what was said by Congressman Carlin and, in turn, by myself:

Congressman Carlin said that he did not desire to place me in an embarrassing position by putting me on the witness stand and putting me under oath as to the reasons for my refusal to comply with the committee's desire that I put Mr. Holme, the said New York Times reporter, under arrest, and asked me what my explanation for it was. I stated to him that under the law I had absolutely no authority to place the said Holme under arrest as no proper commitment of any kind had been filed in my office authorizing me to make this arrest or put the said Holme in custody. I said to him that the facts of the situation were such that I not only had no right to place Holme in custody but that in my judgment the committee had no power to even place him in the custody of the Sergeant at Arms. Congressman Carlin appeared to me to be somewhat upset by my refusal to obey the command of the committee, and I suggested to him that I could show him the law justifying my position. He held a whispered conference with his fellow members of the committee, and almost immediately an executive session was called, and I was requested to bring to the committee the authority that I claimed to have as justification for my refusal to place in custody the said Holme.

I then went to my office and dictated a statement embodying the substance of section 102 of the Revised Statutes. The committee held a conference on this and I thereafter brought to them the Revised Statutes, which they compared with the statement that I had rendered to them, and, apparently, they acquiesced in the proposition that I was correct in refusing to place under arrest the said Holme.

I then suggested to the committee that in 103 United States Reporter a case could be found that would justify the position that I took. They asked me to furnish that volume, which I did, and after reading the Kilbourne case—that being the case I had in mind—they threw open the hearing to the public and resumed proceedings.

During the executive session Holme was in the court room, but not within hearing of what was going on between the committee and myself, and was apparently in the custody of the Sergeant at Arms in the rear of the court room. When the committee resumed its open session, said Holme was brought to the witness chair and the chairman of the committee said that the committee did not wish to place Holme in an embarrassing position by continuing his state of arrest; they stated that they had every intention to be kind and courteous to him, and therefore would allow him his freedom until the committee desired to act further in the premises.

STATEMENT MADE BY UNITED STATES DEPUTY MARSHAL (CHIEF) JOSEPH P. MCDONOUGH, MARCH 23, 1916.

On the day in question, I presume it was March 3, 1916, Mr. Gordon, the Sergeant at Arms of the subcommittee of the House of Representatives, came to the marshal's window and informed me that he had a prisoner that he wished to turn over to the marshal. I said, "What authority have you to present to the marshal for the marshal to receive the prisoner?" He said the committee directed it, and I said I would not receive the prisoner unless a warrant was presented with him; that is the sum and substance of the thing. He turned around and walked out, and it was all over.

Later, John Noon (a deputy marshal) came in and said that the committee wanted to see me, and I went to the committee and told them that I represented the marshal, and they said they wanted to see the marshal, and I came back, and the marshal was engaged, and after the marshal came out of his room I told him that the committee wanted to see him.

There seems to be some difference of opinion about what took place on the occasion when I was called before the subcommittee at an executive session. I have prepared a memorandum. I have not made it very complete in the statement which I have made to the committee. I prepared a very careful memorandum shortly after the occurrence, within a week after the occurrence, which I would like to read to the committee. I am sure I have in there everything that happened. Possibly I have some things in a different order from the way in which they occurred. This is a memorandum of my best recollection of everything that occurred between myself and the subcommittee.

(The memorandum referred to is as follows:)

MEMORANDUM.

On Monday, the 28th of February, 1916, at about 4 o'clock in the afternoon, the sergeant at arms of the subcommittee of the Judiciary Committee of the House of Representatives came to my office and stated to me that the subcommittee was in executive session and desired to see me. I went to the room in which the said committee was sitting and was introduced by Mr. Carlin—whom I had known before—to the other two members of the committee, Messrs. Gard and Nelson.

When I first went into the room Congressman Reardon and United States Marshal McCarthy were present, but they both retired from the room, leaving the committee, myself, and, I think, the sergeant at arms in the room.

Mr. Carlin stated to me that the committee was investigating charges made against me by Congressman Buchanan. He said that the committee had not asked me to appear and that I had not asked to be represented. I told him that that was true, and that I would like it to be understood that my appearance on this occasion was at the request of the committee. To this all the members of the said subcommittee assented.

Mr. Carlin then stated that it was the practice in impeachment proceedings to make a full investigation, and that at the end, if any facts developed which required explanation, the accused official was given an opportunity, if he wished to do so, to present his side of the matter to the Judiciary Committee before it took action.

Mr. Carlin asked me if I had seen the charges of Mr. Buchanan, and I replied that I had not seen any charges nor been served with any charges. He then said that he had them with him, and suggested giving them to me, and I asked him to send them to my office. He seemed rather insistent on giving them to me and had the Sergeant at Arms take from a satchel a copy of a Congressional Record of a date which I do not recall, which contained a speech of Congressman Buchanan moving for my impeachment on some 42 different charges of bribery and corruption. I took the Congressional Record with me when I left.

Mr. Carlin then said Congressman Buchanan had charged me with everything except rape, and that I was too old for that. At this witticism Congressman Carlin and the other members of the committee broke into laughter, in which I did not join.

Congressman Carlin then said that one of the charges against me was that I had caused Buchanan to be indicted without any evidence to support any indictment, and that the committee desired to see the minutes of the grand jury for the purpose of dealing with this allegation. In response to this, I told the committee that they could clear up at once the whole question of whether Congressman Buchanan had been indicted without evidence by requiring him to answer one single question, namely, where did the money come from with which the so-called Labors Peace Council, of which he was the president, had been financed, and what had been done with the money. Congressman Carlin replied that Congressman Buchanan had denied that the Labors Peace Council had any money except a couple of thousand dollars, and that he had never had any of it and had paid his own expenses. I asked Congressman Carlin where Congressman Buchanan had made this denial, and he said that he made it in a public speech. I told Congressman Carlin that before I replied to his request for the minutes, I would communicate with the Attorney General, with whom I had already had a talk on this subject, and that I would advise him as soon as I heard from the Attorney General. He said that he hoped that neither I nor the Attorney General would insist on withholding the minutes from the committee, and said that the minutes would be read only by the subcommittee themselves and shown to no one else. I told him that I would take his request under consideration, and asked him how long the committee expected to be in this city. He said that they were trying to get away as soon as they could, and hoped to be finished by the ensuing Thursday. I told him that I would write immediately to the Attorney General, and would probably have a telegram the next day.

I asked the committee if there was anything further that they required of me, and they said there was nothing, and I withdrew from the room.

I then read the speech of Congressman Buchanan embodying the charges against me and returned the document to Congressman Carlin, with a letter of which the following is a copy:

FEBRUARY 29, 1916.

GENTLEMEN: I have the honor to return herewith with my thanks the copy of the Congressional Record of Wednesday, January 12, which you were kind enough to lend me yesterday.

I do not observe among the charges any charge that the indictment of Buchanan and others was brought about as a reprisal for Buchanan's first motion to impeach me; consequently, I suppose that this charge is evolved from the inner consciousness of some other person or persons.

Respectfully,

H. SNOWDEN MARSHALL,
United States Attorney.

Hon. C. C. CARLIN,
Chairman Subcommittee of the Judiciary Committee,
House of Representatives,
Room 323, United States Courthouse and Post-Office Building,
New York, N. Y.

This letter reminds me of the fact that during the talk in regard to the charges against me Congressman Carlin stated that one of the charges was that I had caused the indictment of Buchanan as a reprisal for the first motion which he made in the House of Representatives to impeach me.

I have omitted to state that Congressman Carlin stated to me that I was charged with having brought about the indictment of a woman of the name of Rae Tanzer without any evidence and the purpose of putting an end to the civil suit which she had brought against one James W. Osborne, said to be a close personal friend of mine. He said that he wished to see the minutes of the grand jury that found that indictment, and, I think, he also asked for the minutes of the grand jury which found the indictment against the lawyers of this woman, the Messrs. Slade.

On the ensuing day, after the committee left the building, I received a telegram from the Attorney General, and I immediately wrote a letter to the chairman of the said committee, as follows:

FEBRUARY 29, 1916.

SIR: Yesterday I was asked to appear before your honorable committee and was asked to produce the minutes of the grand jury in the case of United States *v.* Rintelin, Buchanan, Lamar, and others, and also the minutes in the cases of the United States *v.* Rae Tanzer and United States *v.* Slade and McCullough. At that time I stated to your committee that I would defer answering your request until I could confer with the Attorney General.

I wrote to the Attorney General yesterday afternoon, relating the substance of my talk with your committee, and received this afternoon after the adjournment of your committee and too late to bring it to your attention a telegram, as follows:

"Your letter 28th received.

"Federal grand juries are part of the machinery of the Federal courts, and by long-established practice this department and district attorneys are bound not to disclose testimony and other proceedings had before grand juries, except upon order of court. In present case, moreover, both this department and State Department are of opinion that a disclosure of the proceedings before the grand jury would be prejudicial to the public interests. Accordingly, you are instructed to respectfully decline the committee's request. You may show this telegram to the chairman of the committee."

The original of this telegram is at your service if you desire to see it.

I do not know whether I understand the situation before your committee, but if I am correctly informed Buchanan, who is one of the defendants in this case, has stated that he is innocent, and that therefore there could not have been any evidence before the grand jury which indicted him. From this fact this committee draws the inference that he was indicted without any evidence before the grand jury, and on account of this inference your committee asks for the production of the minutes of the grand jury. In like manner I understand that your committee has been informed by Mr. David Slade that both he and Rae Tanzer were innocent of the crimes for which they were indicted, and from this evidence your committee draws the inference that there was no evidence before the grand jury which indicted these persons. I totally disagree with this reasoning and consider the inference which you draw from Buchanan's uncorroborated statement to be utterly unwarranted.

I am myself in entire accord with the views of the Attorney General as expressed in the foregoing telegram, and I therefore respectfully decline to produce the minutes of the grand juries for which the committee has asked.

If you desire to test the question in any way, I will state for your information that all of the minutes for which you have asked are under my control, and if you desire

me to do so I will appear before your committee and make a record of my refusal to produce the minutes, so that you can take such action in regard to the matter as you may be advised.

Respectfully,

H. SNOWDEN MARSHALL,
United States Attorney.

Hon. C. C. CARLIN,
Chairman Subcommittee of the Judiciary Committee,
House of Representatives,

Room 323, United States Courthouse and Post-Office Building, New York, N. Y.

Beyond the interview above described, my published letter to the committee of March 4, 1916, and the foregoing, I have had no communication directly of indirectly with the said committee.

Mr. STERLING. I would like to ask you another question. I ask you this to get your view of the legal phase of it.

I think you were entirely right in refusing to show the subcommittee the minutes of the grand jury. But it does seem to me that this committee were within their jurisdiction when they asked anybody who knew whether or not there was any testimony. I do not think they had a right to know, and it was not material, what testimony there was, because that was purely in the conscience of the grand jury as to whether or not there was enough testimony. One of these charges made by Buchanan is that the indictments were found at your instigation, and through your influence, and that no evidence was presented to the grand jury.

I believe it would have been perfectly proper for you or your assistants to say to the subcommittee—and I think one of your assistants did say to the subcommittee—that there was evidence. I believe the subcommittee was within its jurisdiction in asking that one question as to whether or not there was any evidence on which to base the indictment. Do you not think so?

Mr. MARSHALL. I suppose it would be assumed if 23 gentlemen on their oaths presented an indictment they would have had evidence to support it.

Mr. STERLING. That is the presumption.

Mr. MARSHALL. That is the presumption. But this is the feature of the case which I want to bring to your attention. If A, B, C, or D is indicted, and he gets up and says, "There is no evidence; I am innocent; I plead not guilty," what court would give him a right to make any inquiry into what the grand jury did, or how it had voted? That was one of the inquiries. What superior right has a Member of Congress?

The CHAIRMAN. Suppose you had pleaded in abatement to the indictment that it was found arbitrarily and without evidence, would not the court have it investigated?

Mr. MARSHALL. I suppose so, if there was anything to support it except a mere statement that I was not guilty. That is all there was to support this inquiry into what the grand jury had done. That was absolutely all there was. There was not another thing, except that Buchanan in a public speech said he was innocent, and that was apparently thought to give the subcommittee the right to call the grand jurymen before it and ask them how they had voted, when they began to take up certain classes of evidence, and at what time certain names were voted for, and what they did. They asked questions about what happened with reference to things that I never knew about.

Mr. STERLING. This is the point about it: These charges that Buchanan made—I think those questions were along the line of the charges—the charges he made were that it was through your influence that indictments were found without any evidence before the grand jury. I agree there is not a thing in the record to show that the charge is true. The charge is made, and the subcommittee is appointed to investigate to see whether it is true. It seems to me they had a perfect right to inquire as to whether or not there was any evidence presented. I agree that what the witnesses said before the grand jury would not have been proper for the committee to inquire into; but that was not necessary with reference to the charges. But it seems to me that the subcommittee, along that line, did not go very far out of their jurisdiction.

Mr. GARNER. Mr. Marshall, listening to the statement you read, I have the idea in my mind that the basis of your entire criticism of the committee is the idea that Congress is lending itself to an effort to shield one of its Members?

Mr. MARSHALL. I am glad you asked me that question, because I want to correct that impression, if such an impression has been made.

Mr. GARNER. Take some of the things in your statement, Mr. Marshall, and I think that is a just inference that can be drawn from your statement, that if Congress is going to take up for investigation charges made by an indicted Congressman from any State in the Union against a district attorney—defense by impeachment—and the committee is going to follow out the allegations in order to determine whether impeachment proceedings lie against the district attorney, they are going to intimidate the judicial branch of the Government and destroy the opportunity of administering justice, and, as far as the Member is concerned, the basis of the entire matter is the action of Congress in ordering an investigation to determine whether they should impeach you.

Mr. MARSHALL. I am very glad you asked the question, because I want that to be entirely clear.

The House of Representatives has the right to vote for an investigation to determine whether an officer shall be impeached on any ground at all. It is none of my business whether it does or does not. A Member can come up and say, "I dreamed the district attorney is a bad man, and I believe in dreams," and if Congress believes in dreams, it has to have the dream investigated, and that is none of my business.

I do not pretend to criticize the motives of Congress. I do criticize the motives of the man who moved the impeachment resolution. I have no doubt about what his motives were, but as far as the right or the power of Congress to order the investigation, that is absolutely outside of anything I have any right to criticize or to discuss.

But when you take that and assume, as it may hereafter turn out to be, that that impeachment proceeding started on the motion of an indicted Congressman who submitted no evidence to Congress, except the statement he made—if you add to that situation the sending of a subcommittee to the town where the district attorney lives, the nomination of the counsel of that subcommittee by the indicted Congressman, the preparation of the case to be submitted to the subcommittee by the counsel for the indicted Congressman, the visit of the subcommittee to the town where the district attorney lives, and the

proceedings that thereafter occurred, the calling of man after man who had been in trouble with the criminal law in force where that district attorney has practiced—if you add all those things together and make a precedent of this procedure for future cases, I guarantee there will not be a district attorney who will prosecute a Congressman.

Mr. GARNER. Are you familiar with the impeachment proceedings in Congress in the past century?

Mr. MARSHALL. I know very little about them.

Mr. GARNER. Suppose it turns out that the proceedings in this case are along the line of the precedents that have been followed in other impeachment proceedings, and let us suppose that the charges that have been made against you are of an impeachable nature, and Congress has seen proper to authorize an investigation of these charges, do you not think the committee ought to exercise every possible effort to ascertain the truth or falsity of the charges and to report to the House of Representatives which created it?

Mr. MARSHALL. Certainly.

Mr. GARNER. The question of employing counsel is one of ethics or advisability, and according to the precedents heretofore the prosecuting witness or the man who made the charges has been allowed counsel of his own selection. There is nothing outside the precedents in this case.

Now, let me ask you one other question.

Mr. CRISP. Was it not true that Congress appointed a subcommittee to investigate the charges preferred against United States Judge Speer, in my own State of Georgia, and Judge Dayton, in West Virginia, and did they not send special committees to hear testimony and report on those charges?

Mr. MARSHALL. Yes.

Mr. GARNER. A subcommittee of the Judiciary Committee was appointed.

May I ask you this other question, and if you think it is improper, or if you do not care to answer it, you may so state. I want to ask if it was a fact that a certain district attorney, whether it be you or some other district attorney, procured an indictment through his influence with the members of the grand jury, without any evidence, would not that be a serious offense?

Mr. MARSHALL. Perfectly outrageous, and an offense for which he ought to be immediately impeached or removed.

Mr. GARNER. This charge was made by Buchanan in the impeachment proceedings against you. So far as I am acquainted with the precedents, all that has been necessary heretofore to impeach an officer of the Government has been for a Congressman to rise in his place and present allegations sufficient to justify the impeachment. Then the custom has been for the Judiciary Committee to look into the matter in order to see whether it should recommend an investigation. That was done in this instance. Everything in your case that has happened has occurred in similar proceedings before had in investigations heretofore made. So far as I know, this is the first time that the good faith or even the wisdom of Congress has been questioned by the person against whom impeachment proceedings have been brought. I imagine in this case it would not have been so if you had not been conscious of your innocence and that the man was under indictment in your own court?

Mr. MARSHALL. Stop there, if you please, and think about it. Think what it means that a man who is under indictment, who has made a foolish lot of preliminary charges against me, when he heard he was about to be indicted, which he has dropped after he is indicted, and mutiplies those charges, making a total of about 42 different crimes——

Mr. STERLING. Thirty-nine.

Mr. MARSHALL. He comes up and says, "I am innocent," and thereupon the main object of the subcommittee that he sets in motion seems to be to get the full minutes of the grand jury.

Mr. GARNER. Let us take that proposition. I do not think you do the subcommittee justice there, Mr. Marshall. I happen to be well acquainted with all the gentlemen on the subcommittee. Mr. Gard was on the bench in the State of Ohio and served there with great distinction, so the story goes. The other gentlemen on the subcommittee have been Members of the House for quite a while. Did they not say the object of getting these minutes was for the purpose of ascertaining the facts, as alleged in the complaint or impeachment proceedings, that an indictment was found without any evidence before the grand jury?

Mr. MARSHALL. Yes.

Mr. GARNER. Did they not also state they wanted that for their own exclusive use and benefit and not for the purpose of letting Mr. Buchanan or any other person have that knowledge?

Mr. MARSHALL. That is quite true.

Mr. GARNER. If that was their object in trying to establish this one fact, this gravest charge in the entire 39 charges, in my judgment; if they were trying to get that one fact, not for the purpose of giving it to Mr. Buchanan or anyone else, but for the purpose of reporting to Congress on the question as to whether impeachment proceedings should be filed against you—in that, do you not think they were within their province in trying to ascertain that fact?

Mr. MARSHALL. I really can not see that they were, to save my life. They had the word of an indicted man to set them in motion, and the oaths of 23 citizens—leaving me out of consideration—against that, and why they were entitled to go into the secrets of the grand jury simply on the say-so of an indicted man is beyond me.

Mr. GARNER. You seem to lose sight of the fact that they were doing what the House of Representatives had told them to do. You are questioning now the good faith or wisdom of the House of Representatives in asking them to determine whether the facts charged by Buchanan were true. It is the whole House of Representatives you must complain against.

Mr. STERLING. Do you think we ought to have questioned the motives of Buchanan? I know how you question them, and we, privately, may have our views about it, but here is a fellow Member of the House who rises in his place on the floor and prefers charges. Do you think we ought to question his motives about it and say to him, "You have made these charges because Mr. Marshall has presented a criminal case to the grand jury against you." Do you think we ought to do that?

Mr. MARSHALL. That is a thing I would rather not express an opinion about. It is clearly outside of my——

Mr. CRISP (interposing). Judge Sterling, is it not true that it was not the individual rising on the floor of the House, preferring charges

against Mr. Marshall, which influenced the House, but was it not the Representative acting in his official capacity, making the charge, which influenced the House?

Mr. MARSHALL. May I come back again to the question Mr. Garner asked just now? The charges that were made—I read the debate, I think of January 12, in the Congressional Record, when the charges were made and filed against me. He did not dare to say I had indicted him because he had moved to impeach me, and there were Members of the House who called attention to the fact that that was not in the charges, and that idea was never suggested until after the charges had been filed and when these gentlemen of the committee handed me the copy of the Congressional Record which they gave me I looked it over and I found there was not a word in the charges that charged me with having had this defendant indicted because he had moved to impeach me.

Mr. GARNER. Possibly you give more consideration to the debates in the House than we do. What we were considering in the House was the charges read from the Speaker's desk against you.

Mr. MARSHALL. That is what I mean now. Take those charges, and you can not find in them any suggestion that Buchanan ever dared to make that I had had him indicted because he moved to impeach me. That seemed to have grown into the situation after he filed the charges.

Mr. STERLING. I think every Member knew when he presented the first charges that there was talk in the newspapers about him having been presented to the grand jury. I had heard it, and I had read something about it in the newspapers. Do you think the Members of the House ought to have questioned his motives because of that fact?

Mr. MARSHALL. I can only say this, if you want my opinion about that. I will assume the same situation to have occurred in cases with which I have to deal. I get a complaint from an interested party. Suppose Jones comes into my office and says he is in a violent row with Mr. Brown and he wants to present charges against Mr. Brown. I find out he has an ax to grind, that he wants to make a collection from Mr. Brown, or has some interested motive, and wants to get me interested. Suppose he is suing Mr. Brown, and while the suit is going on he wants me to jump on Mr. Brown to indict him, and thinks that will help his suit along. I have always said to a man of that kind, "Wait until you get out of your complications and then you bring the case to me, and I will look into it."

I am not venturing to tell you what I think Congress ought to do, but I am simply telling you what I would do in a case of that kind.

Mr. STERLING. I think that would be a matter to consider if it ever came to the trial of an impeachment charge. But all the House could do, it seems to me, would be to start the machinery in motion to take the testimony to see whether or not there was any valid foundation for Mr. Buchanan's charges, and to develop, if possible, any motive he might have had in bringing the charges.

Mr. CRISP. Was that not exactly what Mr. Marshall said he would do, that if anyone made a complaint, he would investigate it? In this case, Mr. Buchanan made a complaint and the House, which, under the Constitution is the body to investigate complaints of this nature, to see whether the House will vote the articles of impeachment, simply proceeded to do what Mr. Marshall said he would do.

Mr. MARSHALL. I said I would tell a man in a case of that kind to wait until he got through the pending proceedings, and then bring his case to me.

Mr. GARNER. Your complaint seems to be not only against the method of the subcommittee, but it seems to be against the action of the House in making an effort to protect Mr. Buchanan. For instance, after relating the proceedings of Congress that were had, you say, referring to the action of the House in ordering impeachment proceedings, "The whole thing seems to me to be a desperate effort to postpone the trial of Mr. Buchanan."

Mr. MARSHALL. I mean it was a desperate effort on Buchanan's part. I did not mean that was what impelled the House to vote for it.

Mr. GARNER. This whole proceeding is leading up to the proceedings of Congress of the 12th of January, and you say, referring to the congressional proceedings, that the whole proceedings seemed to be a desperate effort to postpone the trial of Mr. Buchanan. Of course, that involved the good faith of the House in its ordering this investigation.

Mr. MARSHALL. My language is unfortunate if it created that impression, because I merely meant to say that Buchanan, when he got the resolution through, was making a desperate effort to stave off his trial, and I did not suggest or intimate, and I would be the last one to do it, that the motives of the House of Representatives were the same as those of Buchanan, and when I described the motives of the subcommittee and charged them with the things I charged them with, I did it because they turned Buchanan loose; they did not take the thing in their own hands. They let him do what he pleased. They made his lawyer their associate; they took his witnesses; they never gave anybody else a chance to say anything, and they left a mud bath there for everybody who was opposed to Buchanan, which was left there to ferment.

Mr. STERLING. They had to call the witnesses who had been connected with these things. They may be people in bad repute. I do not know about that. I do not think you ought to find fault with this committee because they called those witnesses. They called your assistants and they would have given you an opportunity—I guess they did so—they would have been glad to have had you come before the committee and make any statement you desired to make.

Mr. MARSHALL. They never said that.

Mr. STERLING. The committee can not select the witnesses. The circumstances determine the witnesses you use—these same witnesses you used in these prosecutions. You used Koogle and his wife to prosecute their attorney. The very same witnesses they called, you used to send people to the penitentiary.

Mr. MARSHALL. I had them corroborated in every corner.

Mr. STERLING. Of course, we have nothing to do with the impeachment charges. All we have to deal with is the question whether or not you are guilty of the conduct charged.

I am free to say I do not think there is anything in your record that casts any reflection on your office. There is nothing sustained. You wrote this letter because you wrongfully assumed this committee was hostile to you. I think you are wrong about that. I

think you have made that one mistake that led to this trouble. That committee is not hostile to you. The committee is fair. They wanted to be fair. The whole trouble comes because you simply assumed that they were hostile to you and going outside of their jurisdiction.

I think they did exceed their jurisdiction when they took the witness Holme into custody, because it was outside the charges they were investigating. But that was a small matter and I would not find any fault with your complaining, although you ought not to have called it "lawless tyranny," because I have no doubt they were acting in good faith, on the spur of the moment. But they had not any right, I think, to take him into custody at all. If he refused to answer when they asked him material questions they should have referred the matter to the House of Representatives.

The CHAIRMAN. That question is not involved here, as to whether they had the right to take him into custody.

Mr. STERLING. Mr. Marshall calls it "lawless tyranny," but it is the thing that instituted Mr. Marshall's letter, I think. He may not have written the letter if that had not happened. I personally regret that you could not have seen your way clear to have withdrawn the letter.

Mr. CRISP. I would like to ask Mr. Marshall if he desires to have the opportunity to cross-examine any of the Members of the House who have appeared before this committee and testified. Speaking for myself, if he does desire that opportunity I am in favor of granting him that privilege. I simply desire to have that appear as a matter of record.

The CHAIRMAN. That is what the record already shows.

Mr. MARSHALL. I do not think of anything now which I desire to ask them. I have only had about an hour and a half to run quickly over the testimony which they have given; but I do not think of anything at all at the moment which I desire to say to them. If I do and if I have time, I will write and let you know about it.

The CHAIRMAN. Mr. Marshall, you are the United States district attorney for the southern district of New York?

Mr. MARSHALL. Yes, sir.

The CHAIRMAN. How long have you held that office?

Mr. MARSHALL. I think I took office on May 7, 1913; about three years.

The CHAIRMAN. You indicted, or caused to be indicted, Buchanan, Fowler, and a number of others for offenses against the Sherman law?

Mr. MARSHALL. I presented the evidence against them to the grand jury, or, rather, my assistants did. I am responsible for what they did.

The CHAIRMAN. After that occurred you were impeached in the House by Mr. Buchanan for malfeasance and misfeasance in office, for crimes and misdemeanors, after that indictment?

Mr. MARSHALL. I suppose so. January 12, I think, was the date.

The CHAIRMAN. Among other things, you were charged with tyranny in the exercise of the functions of your office?

Mr. MARSHALL. I suppose—I do not remember what I was charged with. That is all a matter of record.

The CHAIRMAN. And thereupon the House ordered an investigation of the matter by the Judiciary Committee. You recognize the

right of the House to impeach, following charges made against any Federal officer?

Mr. MARSHALL. Undoubtedly.

The CHAIRMAN. That committee had the power, by act of the Congress, to appoint a subcommittee, which was clothed with all the power of the House in this matter?

Mr. MARSHALL. It certainly had the power to appoint a subcommittee.

The CHAIRMAN. Appointed by resolution of the House itself, authorizing the appointment of the subcommittee. You knew when that subcommittee went to New York that it was the representative of the Congress of the United States?

Mr. MARSHALL. I knew it had been appointed by Congress and had all the power that a subcommittee of the House has.

The CHAIRMAN. And that would be all the power the Congress itself would have, if it were exercising the same duty.

Mr. MARSHALL. That is a question of law. I knew the facts.

The CHAIRMAN. How did you assume what the law was? Did you think this committee was a separate body that might be treated as you saw fit, or was a body that had to be treated as a representative of the Congress of the United States?

Mr. MARSHALL. I thought of the subcommittee very much as a sort of—if you could use analogies—a congressional committee investigating impeachment charges seemed to me to be very much like a grand jury and district attorney combined, to ascertain whether there were charges, and if there were, formulating them and sending them to the Senate for trial.

The CHAIRMAN. You knew that the entire Congress could not go to investigate them and had to act through a subcommittee?

Mr. MARSHALL. Certainly.

The CHAIRMAN. You knew that subcommittee had the power and authority to make that investigation; all the power Congress had itself had been vested in the subcommittee?

Mr. MARSHALL. It had the power given by the resolution under which it was appointed.

The CHAIRMAN. Did you expect to treat the subcommittee one way and the Committee on the Judiciary in another way, that you could separate them in your mind—offend one, but not offend the other?

Mr. MARSHALL. I certainly did. I do not see why——

The CHAIRMAN (interposing). Then you thought the Congress sent out a subcommittee that could be subject to offense and insult, without power to protect——

Mr. MARSHALL (interposing). I did not think that at all.

The CHAIRMAN. What did you think when you offered indignities to this committee?

Mr. MARSHALL. Along that line, I do not remember what I thought. I could not answer your question.

The CHAIRMAN. When you wrote this letter to the subcommittee, were you thinking about the fact that this was a committee of Congress, or that it was a junketing committee, sent up there to protect Buchanan?

Mr. MARSHALL. It is pretty hard to answer a question in regard to what I was thinking.

The CHAIRMAN. What did you say about it in your letter?

Mr. MARSHALL. The letter speaks for itself.

The CHAIRMAN. You wrote the letter on that subject, as it appears in the record?

Mr. MARSHALL. Yes.

The CHAIRMAN. Mr. Holme was a witness called before that subcommittee, and an inquiry was made to him in relation to an article published in the New York Times in which it is said:

It is the belief in the district attorney's office that the real aim of the congressional investigation is to put a stop to the criminal investigation of the pro-German partisans.

Mr. MARSHALL. I am not responsible for that statement.

The CHAIRMAN. You recognize that that statement would be a direct affront to the Congress.

Mr. MARSHALL. Oh, certainly.

The CHAIRMAN. And they were making an inquiry about that in connection with the charges against you of Mr. Holme, and Mr. Holme declined to answer that question, and then you wrote a letter justifying Mr. Holme in his position, and expressing your opinion of the subcommittee. You say this:

What I told him was about as follows.

They had asked whether you had given Mr. Holme the information. You first said:

It is not necessary for you to place anyone under arrest in order to get the answers to the questions which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which he published, and from which he made deductions, so that if your honorable committee has a grievance it is against me and not against him.

Your opinion seems to have been that it was the Congress that was proposing to stop the investigation of the pro-German partisans.

Mr. MARSHALL. I am not quite sure I had even seen Mr. Holme's article at that time.

The CHAIRMAN. You assumed the authority for the statement that it was the Congress that had sent the subcommittee there to stop investigations of that sort?

Mr. MARSHALL. I certainly do not want to be put in that position. Of course, you could work it around to that, but I think that is hardly a fair construction.

The CHAIRMAN. You said further in your letter:

I said that your expedition to this town was not an investigation conducted in good faith, but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

Was it your opinion that Congress had sent these men there, and that their purpose was to intimidate you because some man had been indicted in your court who was a Member of Congress?

Mr. MARSHALL. I do not charge Congress with that. The expedition to the town and the conduct of it were what I was commenting on.

The CHAIRMAN. They were sent there by Congress, to represent Congress.

Mr. MARSHALL. An expedition sent to a place can behave in all sorts of different ways.

The CHAIRMAN. Did you really think that was the intent and purpose of this committee, or were you just angry about this matter when you wrote that letter?

Mr. MARSHALL. I really thought the subcommittee was making a ferocious, venomous, and malignant drive at my office. I was in doubt as to what their motive could be.

The CHAIRMAN. Did you not know their motive was to investigate those questions?

Mr. MARSHALL. If it was they were going about it in the most singular way I have ever seen an investigation conducted, and it did not seem to me they were trying to investigate or to get the truth.

Let me state this, and try to put you in possession of the picture I had there. I saw a committee that had been in Washington taking testimony in secret sessions, in a very decent and respectable kind of way. I saw them come to New York, accompanied by the indicted Congressman who started the thing, and accompanied by these lawyers, and I saw the committee throw their sessions open. I had been standing all through the week a series of bombardments from the committee itself—I am not speaking of the witnesses they called, but I am speaking of the offensive and disagreeable statements the committeemen themselves put in the newspapers about me and about my office. I had realized the thing had a particular significance.

Mr. STERLING. Have you some of those newspaper articles?

Mr. MARSHALL. I have not here; but I can get them for you. I realized if they came there and left that situation, with the public defamation of my office, having conducted the only public part of the proceedings in the town where I live, and then went away, they would have practically succeeded in casting a stigma and a stain on my office that would never be removed whether they went ahead with the impeachment proceedings or not. It struck me that the fact of coming to New York and calling those different men and throwing those hearings open, after having been in Washington and having most of the people who testified in my favor testify secretly, was a use of the committee that Buchanan ought not to have been allowed to make.

The CHAIRMAN. You say further in your letter:

> I pointed out to him that you, contrary to usual practice, had come here and had held public hearings; that among your witnesses you had invited every rouge that you could lay your hands on to come before you and blackguard and slander me and my assistants under the full privilege of testifying before a congressional committee.

You really did not feel they went there for that purpose, did you?

Mr. MARSHALL. I have not any doubt——

The CHAIRMAN (interposing). And that they subpœnaed rouges to injure you?

Mr. MARSHALL. I could only judge of their motives by what they did. Can you imagine yourself—let me ask you this for a moment. Suppose you were trying not to injure a man and find out facts about him and trying to make a rather bona fide investigation as to whether the man was guilty. Can you imagine any safer way to do it wrong than to do what the subcommittee did?

The CHAIRMAN. If they subpœnaed nobody but rouges and thieves to come here, that might be; but did they not subpœna some of the best men in their city?

Mr. MARSHALL. I said among their witnesses; I did not say all their witnesses were rogues.

The CHAIRMAN. Let us get down to the facts. I feel as if you do not want to leave yourself in bad shape in reference to this matter.

Was not that rather an ebullition of passion, growing out of the surroundings, and the opinion you had had of the Buchanan case, rather than a deliberate statement which you would be willing to stand by?

Mr. MARSHALL. I am not going to say to you gentlemen that I was not angry when I wrote that letter, because I was. You can take it and dissect it as you are doing now——

The CHAIRMAN (interposing). I am just reading the body of your letter which comes after the preliminay statement. It is all here to speak for itself.

Getting away from that, because that is an embarrassing proposition——

Mr. STERLING. I wish you would not get away from that, Mr. Chairman. I believe if Mr. Marshall really understood the situation in connection with this matter that he would change his attitude entirely. I know some of the best men in New York testified in that case. Stanchfield is a good man?

Mr. MARSHALL. A first-rate man.

Mr. STERLING. He says your office is run in the best manner. Mr. Wise explained away practically everything charged against you with reference to a certain practice which had been testified about in your office and he and a good many other people speak of you in the very highest terms. That does not indicate to me that this subcommittee was trying to hunt up evidence to damage you.

The CHAIRMAN. Why did you want to make this thing public at the time—this letter?

Mr. MARSHALL. I did it exactly along the line of things of that same sort we have had to deal with in New York many times. This is not the first time such a thing has occurred. We have had prosecuting officers in New York who sometimes have, for the purpose of the destruction of somebody they had reasons to destroy, started very much the same sort of an investigation that this committee was conducting, putting all the evidence against the man in the newspaper, adding their own comments and their own statements about him, and they brought about the ruin of the man, whether the man was ever thereafter indicted or not. I have had to fight some of them, and I have always thought, and think now, that a man under such attack as that, unless he makes a public defense of it at the time, has a stain left on his reputation that never is removed. There will always be——

The CHAIRMAN (interposing). Was not the place for you to make that statement before the committee itself, rather than to write this letter and publish it before they got it?

Mr. MARSHALL. I had in my mind that committee was absolutely hostile from the time they came until they left, and they commenced their proceedings by sending the Sergeant at Arms to bring me, instead of writing me or otherwise asking me to come. They started out by trying to get everything they could out of the grand jury situation, and I was defending that tooth and nail, and was going to keep them from getting it.

The CHAIRMAN. Feeling that the committee was hostile, this letter was made public on your part for the purpose of bringing the committee into ridicule and contempt before the people?

Mr. MARSHALL. It is hard for me to analyze my feelings in regard to that. I would not like to say yes or no to that.

The CHAIRMAN. If it was not for the purpose of discrediting the committee, why did you publish it?

Mr. MARSHALL. I think I have stated the reason. They had adopted the newspapers as the medium of attack. I did not choose them.

Mr. GARNER. In that connection, are you justified in making that statement?

Mr. MARSHALL. I can not see why it is not true.

Mr. GARNER. Let us take the facts. Can you point to any interviews given by the members of the subcommittee in the newspapers calculated to reflect on your office? You have referred to the fact that they gave publicity to the hearing.

Mr. MARSHALL. That is one.

Mr. GARNER. What other fact can you attribute to those three men that would justify that statement on your part?

Mr. MARSHALL. I was going to send you an extract from the minutes of their hearing, calling attention to their own comments and statements, what they said and gave out in the course of the hearing, not what the witnesses said, but what the committeemen said, and that is one of the things I am not prepared now to give you in detail.

Mr. STERLING. There could be no purpose of this subcommittee taking this testimony in secret, because it is to be published for the benefit of the House, anyway.

Mr. MARSHALL. The members of the subcommittee, I have observed in their statements which I was given this morning, said they recognized the propriety, when they called people of doubtful reputations while the committee was in Washington, of calling them in executive session—that they say it was proper for them to do that because until the charges were sustained they did not think it proper to have the hearings public. If they were willing to be guided by that in Washington, under the domination of the whole Judiciary Committee, what happened to the subcommittee in New York, where the public statements would do me the most damage, when they went there with Buchanan and his lawyers and turned the doors open, and turned the floodgates of filth open on me and the people in my office?

The CHAIRMAN. You put yourself in conflict with this committee, to begin with, assuming that the committee was going there for the improper purpose of protecting Buchanan, when, in fact, Congress had sent them to investigate the charges of the tyranny committed in your office. Is not the animus of that letter due to the fact that you were not satisfied with the method in which they were conducting this investigation?

Mr. MARSHALL. That is correct.

The CHAIRMAN. You felt because they were not conducting this investigation in accordance with what you thought was the proper way to do it, that that justified you in publishing a communication that brings the committee into ridicule and contempt—an affront to them and to the body they represent?

Mr. MARSHALL. That is not intended as an affront to the body they represent.

The CHAIRMAN. How can you keep from affronting the body they represent when they are the sole agents of that body and appearing for such duty in conformity with the resolution under which they were appointed?

Mr. MARSHALL. I do not believe, Mr. Chairman, there is one Congressman in ten who if he knew what was done in New York by the subcommittee would approve of it and believe it was right.

The CHAIRMAN. Assuming they would not approve of the particular method in which it was done, yet we have that subcommittee there, acting within the scope of its authority, which it must have been doing in investigating the questions I have called attention to, was it not entitled to the respect of an officer of the Government, or of a citizen even if he were not an officer of the Government, in the discharge of their duties?

Mr. MARSHALL. Of course, your question is to be answered in the affirmative, but is there no remedy if I am right in my view about the procedure I stated? Is there no remedy?

The CHAIRMAN. The remedy you would seem to indicate as the best one would be such an assault upon a committee of this House as to intimidate it and prevent it from the performance of its duties.

Mr. MARSHALL. I never wrote to them until they left town.

The CHAIRMAN. You say in this letter that under no circumstances, so long as you are district attorney, would you permit that committee to have the minutes of the grand jury?

Mr. MARSHALL. Yes, sir.

The CHAIRMAN. One of the very charges against you was that by your tyrannical action you, as district attorney, had forced indictments that were not in accordance with the law. If those indictments were in accordance with law, why was it that you would not be willing to let the minutes be seen?

Mr. MARSHALL. Obviously I could not let the minutes be seen. The case against Buchanan and the others has not been tried yet.

The CHAIRMAN. But that is not the point.

Mr. MARSHALL. There were in those minutes—you may not have read the telegram of the Attorney General—very important and serious matters that were gone into which the State Department did not want to have made public or known to anybody.

The CHAIRMAN. Mr. Marshall, would it not have been your duty as district attorney and a representative of the Government, when called upon by a coordinate branch of the Government in the protection of its honor and dignity against your alleged conduct, to have brought those minutes before that committee and submitted them to that committee, not for publication, but for their inspection simply, in order that they might see that the charge of undue oppression and tyranny against you was not true?

Mr. MARSHALL. I did not think so, and I did not see how, if it should be done, I could protect the minutes from being made a public congressional document.

The CHAIRMAN. That would not have been published in documentary form. You could have submitted them with the understanding that that would not be done.

Mr. MARSHALL. Bear in mind I had the statement made to me by the attorney general that there had been a promise made that those minutes should not be intruded into.

The CHAIRMAN. Is it not a part of the duty of your branch of the Government or the branch of the Government to which you belong to aid the legislative branch of the Government in upholding its power and dignity? Why should there be any conflict at all?

Mr. MARSHALL. I do not see why there should be at all, but in the case of an indictment——

The CHAIRMAN. I understand in the case of an indictment, where there are facts that ought not to be known to the defendants until after the trial, where the secrets of the grand-jury room ought not be disclosed, it is very proper that you should not disclose them in an ordinary way; but there are circumstances under which the court is bound to know what the facts are and the court can order those records brought in, and he maintains that secrecy. Could not you have treated a committee of Congress with the same sort of consideration? Would it not have been the proper thing to do?

Mr. MARSHALL. I do not think so, Mr. Chairman, with all respect, if you will let me rehearse to you what happened. When I declined to give the subcommittee those minutes, I acted under instructions from the Attorney General, who agreed with my point of view, and I said at the close of my letter that I had the minutes and would appear before the committee and make a public record of my refusal, so they might take such steps as they wished to test their right to the minutes.

The CHAIRMAN. We have nothing to do with the Buchanan case except as it incidentally appears here. Do you not know that under the charge against you for tyranny in your office, that was the very gist of the proposition, that there was no such record there: and why, if there was no such record of that sort, if your record was complete and if it showed you had the jurisdictional facts and that you were exercising proper authority, could not you have made a statement then without disclosing even the minutes, that might have been satisfactory to this committee, instead of thwarting the committee in the very purpose for which it was appointed?

Mr. MARSHALL. That was the purpose. If it had to have those minutes, I felt and still feel that it was my duty, whatever the consequence to myself, to keep them from getting those minutes.

The CHAIRMAN. You knew that would keep Congress from knowing the facts, did you not?

Mr. MARSHALL. Knowing the facts, yes; or some facts.

The CHAIRMAN. You did not want Congress to know the facts?

Mr. MARSHALL. It would keep them from knowing the facts until the facts could be properly made public.

The CHAIRMAN. In other words, you set up the power and authority of your office and your right to determine the question above the will of the Congress?

Mr. MARSHALL. I wish you to understand, Mr. Chairman, that I did not act on this thing hastily. I took the advice and instructions of my official chief, the attorney general, and whatever my personal views had been, I was bound to adhere to my instructions. I do not say that because my views differed from those of the attorney general, because they did not.

The CHAIRMAN. Assuming that you were correct—I think it is a great mistake for the judicial branch of the Government to make any such contest against the legislative branch—was it proper for you to indite a communication of that sort to a committee of Congress in the language that has been used in this case?

Mr. MARSHALL. I believe it was.

Mr. STERLING. The committee never tried to force production of the minutes, did it?

Mr. MARSHALL. It did. I see it is stated here that it did not. May I state the facts about that, because I know about that myself? They are all narrated in my statement, that the first day the committee arrived in New York, it started its sessions—that is, it started its sessions on Monday, which I believe was the 28th of February. On that afternoon they asked me for the minutes and you will remember what occurred. I said I would consult the Attorney General. Wednesday morning following, the 1st day of March—the 29th of February coming in there—I gave them the refusal or the instructions of the Attorney General that I should respectfully decline to produce the minutes. After that they subpœnaed my assistant, who had been in the grand jury room, conducting this investigation, and asked him for the minutes, and at the end of his testimony, they intimated to him that he had better stay around some time because they would have an interesting communication to make to him, which the papers took to be a threat to lock him up. After they got through with that, they issued subpœnaes for the two stenographers for the grand jury. I had to send for them and instruct them to respectfully decline. They asserted, and so far as I can make out, they were making every possible effort to get these minutes, and I was, as I understood it, bound to defend them tooth and nail.

Mr. STERLING. They never did arrest anybody for not producing them, did they?

Mr. MARSHALL. No. But the next man might have expected an arrest after my assistant had been warned.

The CHAIRMAN. I believe I asked you before the purpose you had in making the letter public. You wrote a second letter, in which you say that you did not intend to offend the Congress or the Judiciary Committee, "but I do not retract or modify any of those criticisms"—that is, the criticisms you made against the subcommittee.

Mr. MARSHALL. May I ask you to read it all? That is as to the methods of the subcommittee.

The CHAIRMAN. Yes; I will read it all.

Referring to my letter of March 4, addressed to the chairman of the subcommittee, which has recently taken testimony in New York concerning my administration of my office, I notice from the press that some persons appear to have construed my statements as directed toward your honorable committee as a whole. I beg to advise you that the criticisms in that letter were addressed to the methods pursued by the subcommittee. I do not retract nor modify any of those criticisms. But I did not intend (nor do I think my letter should be so construed) to reflect in any way upon the Judiciary Committee, nor did I question the power of the House of Representatives to order such an investigation. If you and the other members of your committee for whom I have high respect, have gained the impression that my letter carried any personal reflection upon your honorable committee, it gives me pleasure to assure you that I had no such purpose.

You meant by that, did you, that you had no respect for that subcommittee? That is the inference I draw from the letter. I want to know whether or not that is what you intended?

Mr. MARSHALL. I do not think that inference ought to be drawn. I wrote that letter to Mr. Webb. I have known Mr. Webb, and I have known a number of gentlemen in Congress, for whom I have the highest respect.

The CHAIRMAN. You do not retract or modify any criticisms of the subcommittee?

Mr. MARSHALL. If you will read the whole letter——

The CHAIRMAN (interposing). I read it all. You say you have great respect for the Judiciary Committee and the House of Representatives, leaving the impression that you had none for that subcommittee.

Mr. MARSHALL. I certainly did not say that, and I did not intend to state that.

The CHAIRMAN. Mr. Marshall, you have written these two letters, and, of course, you must realize that that letter is an intensely offensive document to that subcommittee. After you have had time to reflect upon the letter and upon the whole matter and all the whole facts and circumstances connected with it, do you still want this committee to understand that you meant everything you said in those letters, and that you have no apology to make in reference to them?

Mr. MARSHALL. I do, Mr. Chairman.

The CHAIRMAN. You do?

Mr. MARSHALL. Yes, sir.

The CHAIRMAN. Understanding fully that this committee represented the House of Representatives?

Mr. MARSHALL. Yes, sir.

Mr. GARNER. Mr. Marshall, I can not get away from the unfortunate language you used in writing this letter and the statement that you filed with the committee to-day, nor from the fact that in it is conveyed the idea beyond question, to my mind, that you had in view the wisdom and the patriotism of the Congress itself in ordering this investigation against you. In glancing through this statement here, while you have been testifying—which was evidently deliberately prepared, though probably hastily, as you say, after you got your letter—I am led to the inference that you are willing to sacrifice your personal interest in the matter and everything in order to establish a precedent in the Congress and throughout the country of the fact that when a Member of Congress is indicted, if he impeaches the district attorney in the Congress, that the Congress itself ought not to pay any attention to that impeachment. Do not you intend to convey that idea?

Mr. MARSHALL. Yes.

Mr. GARNER. You do?

Mr. MARSHALL. I do not think it ought to be done—not that idea alone. I think it ought not to be done coupled with the other circumstances of this case. It ought not to be done plus the appointment of a subcommittee. I do not want you to take any one thing out of my whole picture and make it stand alone, because it is not intended to do that.

Mr. GARNER. But you do present an argument here——

Mr. MARSHALL (interrupting). Against the course of Congress——

Mr. GARNER (continuing). Going toward the policy of the House of Representatives in giving consideration to impeachment proceedings that may be filed by a sitting Member while he is under indictment in a district court of the United States.

Mr. MARSHALL. Plus turning over to him, for his——

Mr. GARNER (interrupting). You do make that proposition, which makes no difference what the charges are——

Mr. MARSHALL (interrupting). I do not think so.

Mr. GARNER (continuing). Because there can not be any higher charges against a district attorney than the fact that by the tyranny of his office he procures an indictment against citizens of the United States without any testimony whatever.

Mr. MARSHALL. I do not know of such a possibility.

Mr. GARNER. Do you know of a higher offense against society that a district attorney could perform?

Mr. MARSHALL. That is a dime-novel theory. It has not been done by anybody anywhere.

Mr. GARNER. I am not saying it was done. I am simply putting a hypothetical case to you. In this instance a Representative of Congress did impeach a district attorney and alleged in his impeachment proceedings that he had procured an indictment by tyranny and influence in his office without any evidence to sustain it. That is about as high a charge as I can conceive of against a district attorney. Your position, if I understand it correctly, is that the Congress or the House of Representatives, when those charges are made by a sitting Member who has been indicted, ought not to give them any consideration or make any investigation concerning them?

Mr. MARSHALL. No; I do not want you to tie me to that thing, leaving all of the rest of it out. I had never had any objection to an investigation of anything. But here, just before the Buchanan trial, to have this expedition brought to New York, and have this so-called investigation made, which consisted mostly of abuse and villification—sticking it all in the newspapers—what better thing could be done? What could you give a man better if he was under accusation of crime, if he could do what has been done here, and who would have prosecuted him?

Mr. GARNER. I agree with you that you have raised a very interesting problem that might be considered by the House of Representatives and might be a precedent—that a sitting Member who is under indictment ought not be permitted by the House of Representatives to file impeachment proceedings against the prosecuting officer. I want to call your attention to your statement here, in which you said to this committee to-day:

> Defense by impeachment, as I have said, is a novel defense.

Mr. MARSHALL. That is true.

Mr. GARNER. That is the act of the House of Representatives.

Mr. MARSHALL. That is perhaps where I am a little confused in my language. The language which the chairman has used here and the language that is used by the subcommittee and the language that is used all through this record is that I was what they described as "impeached" when Buchanan got up and made his speech. That is what they call impeached. He gets up and says, "I impeach the district attorney," etc. If my language is wrong, I have followed the committee's language and the language of the chairman of this committee.

Mr. GARNER. Here is your language:

> It is my unfortunate lot to take part in the first case of this character.

Mr. MARSHALL. Is not that true? This is the first time a Congressman ever did this.

Mr. GARNER. I am trying to lead up to the proposition that you are willing to make yourself a martyr in this instance in order that

the Congress of the United States may be impressed with the unwisdom, if I may use that term, of ever again considering the proposition of impeaching a prosecuting officer of a sitting Member.

Mr. MARSHALL. Or of adopting this course of conduct which has been adopted in this case—the whole case. I do not mean they could not impeach him. Suppose a man is bribed to prosecute a Congressman and the proof is brought to the Congress that he had been bribed to do it and Congress looked into it and acted carefully and made a study of it and found there was substantial evidence of it, I think a thorough and patient and temperate examination of that should be made.

Mr. GARNER. Let us see if you mean that with reference to this committee:

At whatever discomfort to myself, it is my intention to see this case to the end. Surely the House of Representatives does not contemplate establishing the precedent that violators of criminal law—

You are not talking about the subcommittee now—

if they happen to be Members, will find in it a "White Friar" or "Alsatia" w ich will be their sanctuary against prosecutors who seek to apply that law.

You were not speaking about the conduct of a committee at that time. You were speaking about the House of Representatives in ordering an investigation of impeachment proceedings by a sitting Member who happened to be under indictment. All through your statement and in your letter here the whole body of the House of Representatives seemed to have been in your mind. I will call your attention to your letter for a moment, in which you said:

I said that your expedition to this town was not an investigation conducted in good faith, but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

"Your honorable body" must have referred to the House of Representatives.

Mr. MARSHALL. Yes; but it is addressed to the committee, "the expedition" of the committee "to this town."

Mr. GARNER. You knew they went under the direction of the House of Representatives, and what I want to get in my mind is whether or not you, as district attorney and a Federal officer, had such conception of the House of Representatives that they were parties to an effort to shield a criminal because he happened to be a Member of the House of Representatives.

Mr. MARSHALL. Let me say again, and make it as strong as I can, that I have no such ideas; and while, of course, you can take this statement which I have prepared here hastily and find little pieces in it that mean that, I do not think there is any of the statement that conveys the idea that you just suggested; and if there is any, it is not intended. It is a slip of some sort.

The CHAIRMAN. Your whole idea, Mr. Marshall, was to express your profound contempt for that subcommittee? That was all, was it not?

Mr. MARSHALL. Is that quite a fair question to put to me?

Mr. GARNER. I think it is due to the subcommittee to express my opinion concerning their impartiality toward you. In my candid judgment, that subcommittee was partial to you in their hearts and in their sentiments. I do not believe when they started in to inves-

tigate this matter that there was any impeachable act of yours that should be presented to the United States Senate. I do not know what their opinion is now, but that is my judgment about it, because I know these men and I have heard them express themselves, and I know their very high character, and I think you had an erroneous idea in the beginning as to the character of the men and the purpose they had in view. I think another thing, if you will permit me to put it as a matter of suggestion—that you people in New York conduct too much of your business through the newspapers. Your statement here this afternoon is with reference to what the newspapers said and did, and too much of your public business is conducted through the newspapers.

Mr. MARSHALL. I agree with that fully, and I do not think any of this ought to have been in the newspapers. I think that nine Members of Congress out of ten, if they had that thing to take care of, would have conducted it just the way the proceedings of the whole committee were conducted here in Washington.

The CHAIRMAN. I asked a question a little while ago which you said you thought was not fair. I do not want to put a question that is not fair. May I put it to you in another way? The opinion that you expressed in the two letters that you wrote to the subcommittee and to the full committee on this question was your opinion and feeling against the three members of the subcommittee and not against the Judiciary Committee as a whole and not against the House? Is that what you want us to understand?

Mr. MARSHALL. The language of the whole letter explains itself. It was against the methods of the subcommittee. I do not know those gentlemen—that is, I have a slight acquaintance with Mr. Carlin only.

The CHAIRMAN. That involves the whole thing—their conduct.

Mr. MARSHALL. I would not undertake to form an opinion; it is of no importance what my opinion is.

The CHAIRMAN. Your opinion will be determined from what you wrote, of course. You meant that to be against the subcommittee and not against the House of Representatives?

Mr. MARSHALL. Against the methods of the subcommittee, if I may repeat that, because I say at the end of my statement here submitted to-day that I knew always there was nothing personal against me in this thing. These gentlemen of the subcommittee did not know me. So far as Buchanan and I are concerned, I do not think we would know if we met each other on the street. We met once 10 years ago, I believe.

The CHAIRMAN. What I want to get at is whether, in the event this committee of the House should think, from the whole proceeding, that you are in contempt of the House, you intended what you had done in stating this matter as being directed against the House and the Judiciary Committee, or whether it was merely against the subcommittee?

Mr. MARSHALL. It was not directed against the House. It was not directed against the committee. It was directed against the methods of the subcommittee only. I make that as plain as I possibly can.

The CHAIRMAN. If it should be held that the subcommittee was in effect the House of Representatives under the circumstances, acting

under its power and authority, and that whatever you did against them would be against the House, I take it you would want to apologize to the House?

Mr. MARSHALL. I can not imagine such a contingency. I would have to deal with it as a separate matter.

The CHAIRMAN. You can not imagine that the committee would hold that the subcommittee was acting for the House of Representatives and clothed with its power and authority, and that whatever indignity you offered to them was an indignity offered to the House? You say you can not imagine that?

Mr. MARSHALL. No; it is almost impossible to me. I should have to wait and deal with that when it arose.

The CHAIRMAN. I can not conceive how it is that any other opinion could be held than that a contempt of this committee would be a contempt of the House itself, because, if the House is not clothed with the power to follow its committees and protect them from intimidation and insult, then the House itself is powerless.

Mr. STERLING. That is true if the committee is proceeding under the rules of Congress and within its authority.

The CHAIRMAN. Of course, if the committee were acting ultra vires, that is another question.

Mr. LENROOT. Do you wish the committee to understand, Mr. Marshall, that you had no intention of casting any reflections upon the subcommittee or their motives, but only as to the subcommittee's methods of pursuing the investigation?

Mr. MARSHALL. Yes; my criticism was of the methods pursued by that subcommittee. I have stated that several times.

Mr. LENROOT. I know you have, but do you wish us to understand that you had no feeling against or toward the members of the subcommittee and did not wish this letter to carry any reflection upon the members of that subcommittee?

Mr. MARSHALL. The situation was this: There had been a week of successively aggravating publications in the newspapers in New York. One thing after another had been brought out. At odd times the statements of the subcommitteemen and their comments on the evidence had been brought out. There was left a public impression that would have lasted forever if I had not answered it in the forum which they chose, and I had to do what I did; I could not have done anything else. It was a necessity that I was placed under by circumstances which I did not set in motion.

Mr. STERLING. Why do you hold the committee responsible for those publications in the newspapers? They were written by reporters that were there.

Mr. MARSHALL. Yes; they were written by the reporters who were there, but the proceedings were thrown open by the subcommittee after stating, and agreeing—and in those statements that I see they have made to this committee—that that was not proper in Washington, but in New York it seems for some reason to have been proper. The Washington hearings were hearings in executive session, so all this mud and filth could not be tossed around by these people they subpœnaed. The minute the subcommittee hit New York the restrictions are removed for some reason that is not disclosed.

Mr. CRISP. Mr. Marshall, will you send to the committee with your statement some of the articles that you say appeared in the newspapers chargeable to the members of the subcommittee at which you took offense or which you think were improper?

Mr. MARSHALL. I will see if I can get them together.

Mr. STERLING. Will you also mark in this printed record of the testimony taken before that subcommittee in New York the things that you particularly complain of showing bad motives on the part of the committee?

Mr. MARSHALL. All right, sir.

The CHAIRMAN. Send us anything, Mr. Marshall, that you want to send, which you feel justifies you in your course in this matter, or which you feel is in mitigation of it in any way.

Mr. MARSHALL. I will do so, Mr. Chairman.

The CHAIRMAN. Is there anything further you wish to present at this time?

Mr. MARSHALL. No; not now, but I would like a little time to run over these statements I have.

The CHAIRMAN. There is nothing you want to send to the committee now except some explanations of that testimony?

Mr. MARSHALL. Some comments on that, and some newspaper articles which have been asked for.

The CHAIRMAN. Very well. The committee will stand adjourned, subject to the call of the chairman.

(Whereupon, at 4.30 o'clock p. m., the committee adjourned.)

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, April 12, 1916.

MY DEAR SIR: I have been under great pressure of work since my return and this is the first opportunity I have had to write to you.

On the hearing on Monday, April 10, before the select committee, of which you are chairman, I was asked by Congressman Sterling to direct his attention to some of the striking instances of offensive statements on the part of the subcommittee. He also asked me to send him some of the newspaper statements which I mentioned during my testimony. I asked the committee for leave to make such comments as I thought should be made on the testimony of the subcommittee and of Mr. Webb before the select committee, taken on April 7, 1916.

First. My time is so short that I can not make a complete statement about the offensive statements made by members of the subcommittee. I inclose, however, the copy of the testimony taken before the subcommittee in New York, with pencil marks indicating some of the most conspicuous instances of conduct of that character. While on this subject I should like to ask you and Mr. Sterling to be good enough to examine the memorandum which I have had prepared by Mr. Wood, and which I inclose herewith. The first part of the memorandum deals with Mr. Gard's explanation of his question to Mr. Anderson, in which Mr. Gard intimated that there had been bribe paid to one of my assistants. You will recall that this was discussed at the hearing before your committee on Monday, and Mr. Sterling suggested that Mr. Gard might have gotten confused. I think Mr. Wood's memorandum completely disposes of the possibility of Mr. Gard's having been confused and demonstrates that his intimation that there had been bribery of my assistants was a deliberate effort to publicly slander my office.

It is really very hard for me to debate questions of this sort. The questions which your committee has to pass upon seem to me to be extremely important, and all of the facts ought to be undisputed and you should not be embarrassed by misleading statements and by the necessity of weighing evidence. The statements which are now made by members of the subcommittee are to the general effect that they were so extremely fair and considerate to me and my assistants when they came to New York that there was no provocation whatever for the letter which I wrote and which

is claimed to be a contempt of the House. I do not wish to argue these facts with the subcommittee. If you have any doubt about their course of conduct, which became and was a public scandal in this city, I would ask you to take some steps to satisfy yourselves on the subject. There are two important associations of lawyers in this city, one being the Association of the Bar of the City of New York, of which ex-Attorney General Wickersham is president, and the other being the New York County Lawyers' Association, the president of which is the Hon. Edgar M. Cullen, ex-chief judge of the court of appeals of this State. If you will write to these gentlemen for a report on the facts, or write to any other reputable lawyer in this city, I think you can readily satisfy yourselves as to the course of conduct of the subcommittee while they were here.

The statements by the members of the subcommittee are, of course, made by interested parties and, I suppose, the same criticism ought to be made of any statement which I make. I think you can satisfy yourselves easily and simply on this question of fact if you wish to do so by adopting the course which I have suggested and I am quite sure that either of the organizations which I have referred to, or both of them, would be glad to make to you promptly an unbiased statement of the facts.

Second. Complying with the request of Mr. Sterling, I inclose herewith some clippings from the newspapers concerning the "investigation" conducted by the subcommittee.

Third. Comments on testimony of Mr. Webb and members of the subcommittee:

(1) Mr. Webb is misinformed as to the publication of my letter of March 4, 1916, to Mr. Carlin. I took particular pains to see that the letter was not released to the press until it had been delivered to Mr. Carlin. It was not released to the press until 4 p. m. of Saturday, March 4, 1916, and it was delivered to Mr. Carlin certainly about 2.30 p. m. on that afternoon. I know nothing about the person who may have called Mr. Carlin up on the telephone, and who, as he says, refused to give his name.

(2) I shall not debate the claims made by the members of the subcommittee to the effect that the indictments against Rae Tanzer and the Slades were a wrench of the Federal jurisdiction. The indictments have been returned and the defendants are to be put on trial, and I see no reason for engaging in a discussion with the subcommittee as to the propriety of the indictments. The subcommittee has derived its information wholly from Mr. Martin Littleton, who was not examined in New York, and whose testimony I have not seen, and who was the attorney for the Slades, and from the Slades, who are under indictment, and from other interested parties. They have never done me the honor of asking me to state my views. If they wish to form their opinion in this way, they are at liberty, of course, to do so.

(3) I observe the statement made by Mr. Webb, on page 24 of the minutes of the testimony taken before the select committee, referring to the telegram of the Attorney General, "* * * when Mr. Marshall presented the telegram to the members of the subcommittee, that was the end of the grand jury minutes. They never issued subpœna duces tecum to get the minutes at all * * * they never issued a subpœna duces tecum, and when Mr. Marshall presented this telegram from the Attorney General, that was the end of it."

Mr. Webb has evidently been totally misinformed about the facts. The copy of the Attorney General's telegram was given to the subcommittee on the morning of Wednesday, March 1, the letter being physically delivered to Mr. Nelson on that morning. The delivery of the letter was by no means "the end of it." On March 2 the subcommittee subpœnaed my assistant, Mr. Raymond Sarfaty, who had been in charge of the investigation into the Buchanan case, and asked him about the grand jury proceedings. He was asked a number of questions as to what occurred in the grand jury room, which he refused to answer. He was asked (p. 202 of the printed record) whether he expected to be in New York for the next few days, "because the committee may have an interesting communication to make to you." This was obviously intended to convey a threat of punishment to my assistant, and was reported in the newspapers as a threat of punishment for contempt.

Having thus advertised the prospective fate of a witness who refused to give the grand jury minutes to the subcommittee, the subcommittee placed the two grand jury stenographers under subpœna, and intended, I suppose, to put them on the stand. I learned of the occurrence and advised both of the stenographers that they were officers of the Department of Justice, and were under my strict instructions to refuse to divulge anything that happened in the grand jury room. Mr. Webb is perhaps literally correct in stating that the subcommittee did not issue a subpœna duces tecum to get the grand jury minutes, but, if he has been informed that the subcommittee dropped the whole subject when they learned of the telegram of the Attorney General, the information is utterly inaccurate.

(4) Referring to the comments which the subcommittee make on what they described as my arrogant manner when I came before the subcommittee, I am, of course, unable to testify. I endeavored to treat the subcommittee with entire respect. I submitted, during my testimony before your committee on Monday last, a memorandum of what occurred before the subcommittee on that occasion, which is as accurate as I can make it. I had been brought before the subcommittee, not by an ordinary invitation, but was accompanied to their presence by the Sergeant at Arms of the House. I had learned that the subcommittee, in violation of the promise which I had been informed was made by Mr. Carlin to the Attorney General, had started off to pry into the secrets of the grand jury room, and under the circumstances I took the greatest care to limit the conversation to the subjects which were brought up by the members of the subcommittee. When they proposed to hand me a copy of the charges, I thought that if there had been charges formulated against me it would be wiser to have them served upon me in some formal manner, and asked that they be sent to my office. Nobody, of course, can testify about what his manner indicates to anybody else, but I am entirely sure that even under the circumstances in which the subcommittee placed me, I said nothing that was in the least degree disrespectful to the subcommittee.

(5) I note Mr. Gard's statement on page 71 of the record of your committee, "We told him that he was entirely welcome to be present at any time, either himself or by his attorney." The statement to which Mr. Gard refers was made by Mr. Carlin and was to the effect that I had not been asked to be present or represented and had preferred no request to be present or to be represented. I followed Mr. Carlin's language closely and have no doubt at all about the accuracy of my recollection.

Lastly, and in justice to my assistants and myself, who have been under attack, I wish to comment generally on the various criticisms of the conduct of my office which have been made by the subcommittee in their testimony before the select committee. There is not one single subject involved in these criticisms in regard to which I have had any opportunity at all of stating my side of the case. The investigation, if it may be so termed, has been wholly one-sided, and most of the witnesses whose testimony has been apparently accepted by the subcommittee are persons who have the strongest sort of grudge against my office. The fact that I do not take up in detail many of the statements which I observe in the stenographic minutes will not, I am sure, be construed by the select committee as an assent to the correctness of the statements which have been made to you.

I am relying on the fact that one of two things is sure to happen: Either the charges of Mr. Buchanan will fall of their own weight or else, perhaps, in the House of Representatives, or surely in the Senate, the time will come when I and my assistants will have an opportunity to present the evidence on our side of the controversy.

Very respectfully,

H. SNOWDEN MARSHALL.

Hon. JOHN A. MOON,
Chairman Select Committee of the House of Representatives, Washington, D. C.

P. S.—I am addressing this letter to you because, while my answers apply to questions by the different members of your committee, I was requested on the hearing last Monday by Mr. Sterling to send my communication to you.

H. S. M.

[Memorandum for Mr. Marshall.]

I understand that Judge Moon or one of the other members of the select committee of the House told you that Mr. Gard might have thought that Mr. Anderson was my client, and had gotten me mixed up with Hershenstein when he asked Mr. Anderson the following questions:

"Mr. GARD. How much did you pay Mr. Hershenstein for his services?

"Mr. ANDERSON. What did I what?

"Mr. GARD. What did you pay Mr. Hershenstein for his services?

"Mr. ANDERSON. Up to the present I have not offered him any pay.

"Mr. GARD. That is interesting. How much do you intend to offer him?

"Mr. ANDERSON. That I intend to offer Mr. Hershenstein?

"Mr. GARD. You said, 'Up to the present I have not offered him any pay;' how much do you intend to offer him?

"Mr. ANDERSON. I do not intend to offer Mr. Hershenstein anything; he has not asked me for anything.

"Mr. GARD. We are glad to know that; you said up to the present time you had not offered him anything." (P. 253 of the record.)

There could have been no misapprehension about Mr. Anderson being my client, because Mr. Anderson had testified in answer to a question from Mr. Gard:

"Mr. GARD. Do you know anything about Mr. Wood's connection with that case?

"Mr. ANDERSON. No, sir; he had no connection through me in this case. I did not know Mr. Wood." (P. 250 of the record.)

I had testified before Mr. Anderson was called and had told the committee that I had appeared as an attorney representing the Pikes Peak Film Co. (p. 226 of the record), and that I did not know the complainants, Messrs. Anderson & Burke, and had never heard of them until several days after the complaint had been made to Mr. Hershenstein (p. 226 of the record).

In addition to this, after the committee had adjourned and Mr. Gard was asked about this question—the following appears in the New York World of March 3:

"Toward the end of Mr. Anderson's examination suddenly and sneeringly Congressman Gard asked the witness: 'How much did you offer Hershenstein?' The witness was plainly surprised and affronted. 'I have not made him any offer yet,' he replied slowly. 'That is interesting,' was the response. 'How much do you intend to offer him?' The witness replied that he had 'no intention at any time of offering any sum whatever.' After adjournment Mr. Gard was asked if there had been anything in the testimony to create an impression or suspicion that corruption had existed in the district attorney's office. 'There has been nothing of the kind,' he replied: 'the question was just a fisher.'"

I note in the statement made by the members of the subcommittee of the Judiciary Committee that in order to be fair to you the subcommittee, although Safford had been subpœnaed to appear in Washington, would not hear him because they heard he had been convicted of perjury.

The facts are that the committee was advised when Benjamin Slade was on the stand that Safford had been convicted of perjury. On page 116 of the record he was asked by Mr. Carlin:

"Safford was tried and convicted, was he not?

"Mr. SLADE. Yes, he was; the case is now before the circuit court of appeals.

"Mr. CARLIN. What was he convicted of—perjury?

"Mr. SLADE. Yes, perjury."

I also testified that Safford had been indicted and convicted of perjury. (P. 249 of the record.)

Benjamin Slade was examined on February 29, the second day of the committee's sessions, and I was examined on March 2, the fourth day of the sessions, so that it is apparent that early in the hearings the committee was advised that Safford had been convicted of perjury. The record shows that Safford was in court on Friday, March 3, when, referring to Safford, Mr. Carlin said: "It is not necessary; he is here to testify for himself." (P. 293.)

It also appears that on Saturday, March 4, Mr. Safford was called by Mr. Carlin, but he was not in the room. (P. 322.)

It would appear, therefore, that the committee was prepared to call Safford as a witness while holding sessions in New York.

CHARACTER OF SOME WITNESSES CALLED.

Simon H. Kugel, twice tried for conspiracy to conceal assets, both trials resulting in a disagreement. When Judge Learned Hand sentenced Rogal and Brass, indicted as coconspirators upon their plea of "guilty," he stated in open court that he did not intend to punish those defendants severely since the real guilty defendant had escaped.

Judge Hand was not called as a witness.

Herman H. Oppenheimer, called as a witness, was deeply involved in the Rogal & Brass bankruptcy—afterwards indicted in the Samuels bankruptcy—and who has been so far successful in delaying the trial of his case.

Benjamin Slade, whose brothers are under indictment in this district and his brother, Maxwell Slade, under indictment in the State court in Brooklyn. This witness was permitted to make statements to the committee which would not be permitted in any court in the country.

Moses W. Saxe, a partner of Simon H. Kugel, who indorsed a check of Rogal & Brass for $750 on the day before the petition in bankruptcy was filed, and who also gave money to Rogal when Rogal fled the jurisdiction to avoid service of process in the bankruptcy court. Saxe was strongly suspected of being a coconspirator with Rogal & Brass in the Kugel case.

Salic Goodman, an expressman, who was conclusively shown in the Kugel case to have handled the concealed assets and who was identified by Miss Curtis, of Phila-

delphia, and Mr. Wakefield, also of Philadelphia, as the man who had concealed the assets in warehouses in Philadelphia.

Keen & Bard—David Keen and Arthur Bard—associated in the moving-picture business, about whose conduct you are more familiar than I am.

Marie and Frank Doran, her brother, well known as a couple of cranks and chronic complainers.

Henry Siegel, who, according to his own testimony, ought to have been indicted. His character is best attested by his own testimony. At page 264, he testified that he said to the foreman of the grand jury: "You dirty son of a bitch, whoever told you I am anything like that?" The committee was offered Siegel's statement, made in the district attorney's office, but they said to Hershenstein that it "was not necessary."

Jacob Engle, retained by David Slade to represent Frank D. Safford, who admitted on the witness stand that he had furnished Safford with money in the Tombs.

Mayer Paltrowitz, who gave Safford, at the suggestion of David Slade, a position after Safford had spent several days on Long Island under an assumed name.

Aaron Feldman, brother-in-law of Simon H. Kugel, moved the concealed assets from Bridgeport and Hartford, Conn., to New Haven, Conn., changing the cases in which the goods had originally been packed, and also changing the markings on the cases. His participation in the scheme was shown beyond the shadow of a doubt.

You will note that I was examined particularly about my conduct during the Kugel trials, and that although I tendered the subcommittee the minutes of that trial, the minutes were not called for.

If the subcommittee had examined the minutes in the Kugel case they would have found the close connection between Goodman and the concealed assets, Feldman and the concealed assets, Kugel and the concealed assets, and the close connection between Oppenheimer and Kugel, and the very suspicious conduct of Saxe.

You will note also that when William Leary, the deputy clerk of the court, was called with the records in the Oppenheimer case, it was clearly shown that Oppenheimer had lied to the subcommittee; Oppenheimer was permitted to stand up while Mr. Leary was being examined to make explanations of his testimony.

You will note in my testimony and in that of Judge Swann and that of Carl Whitney, the suggestion that the grand jury minutes in the Bard & Keen matter had been submitted to the county district attorney's office. This was flatly denied by Mr. Brogan, the assistant who had charge of the matter, and also by myself.

R. B. W.

APRIL 12, 1916.

O

163 *Opinion.*

United States District Court Southern District of New York.

UNITED STATES OF AMERICA ex Rel. H. SNOWDEN MARSHALL
against
ROBERT B. GORDON, Sergeant-at-arms of the House of Representatives.

This is a writ of habeas corpus sued out by the Relator to relieve him from an arrest made by the respondent, the Sergeant-at-arms of the House of Representatives. The relator was arrested on June 26, 1916, and is still in custody. The respondent justifies in his return by virtue of a warrant issued by the Speaker of the House under the seal of the House, attested by the Clerk, on the 22nd day of June, 1916. This warrant recited a resolution of the House on June 20, 1916, directing the Speaker to issue his warrant directed to the Sergeant-at-Arms to take the relator in custody and bring him to the bar of the House to answer the charge that on March 4, 1916, he violated the privileges of the House by writing and publishing a letter. The letter in question was incorporated into the resolution and is as follows:

"Department of Justice,
United States Attorney's Office,

NEW YORK, March 4, 1916.

"SIR: Yesterday afternoon, as I am informed, your honorable committee ordered the arrest of Mr. L. R. Holme, a repre-
164 sentative of a newspaper which had published an article at which you took offense. The unfortunate gentleman of the press was placed in custody under your orders. He was taken to the United States Marshal to be placed in confinement (I do not understand whether his sentence was to be one day or a dozen years). The Marsal very properly declined to receive the prisoner. This left you at a loss, and I am advised that you tried to work your way out of the awkward situation by having Mr. Holme brought back and telling him that you were disposed to be 'kind' to him and then discharged him for the purpose of avoiding unpleasant consequences to yourselves.

You are exploiting charges against me of oppressive conduct toward a member of your honorable body who is charged with a violation of law and of oppressive conduct on my part toward shysters in the blackmailing and bankruptcy business.

I may be able to lighten your labors by offering to resign if you can indicate anything I ever did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.

The supposed justification of your order that Mr. Holme be placed in custody was his refusal to answer the question you asked as to

where he got the information on which was based the article which displeased you.

It is not necessary for you to place anyone under arrest in order to get the answers to the question which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which he published and from which he made deductions, so that if your honorable committee has a grievance, it is against me and not against him.

165 What I told him was about as follows:

I said that your expedition to this town was not an investigation conducted in good faith, but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

I said that your whole proceeding here was irregular and extraordinary; that I had never heard of such conduct of an impeachment proceeding; that charges of this sort were not usually heard in public until the House of Representatives had considered them and were willing to stand back of them.

I pointed out to him that you, contrary to the usual practice, had come here and had held public hearings; that among your witnesses you invited every rogue that you could lay your hands on to come before you and blackguard and slander me and my assistants under the full provilege of testifying before a congressional committee.

I told him that you had called one of my junior assistants before you and had attempted to make it publicly appear that his refusal to answer your questions as to what occurred in the grandjury room in the Buchanan case was due solely to my orders. I said that at the time you attempted to convey this public impression you knew that it was misleading because I had been asked by you to produce the minutes of the grand jury and had been instructed by the attorney general not to comply with your request, as you well knew. I showed him the telegram of the attorney general to me and showed him a copy of my letter to you, dated February twenty-ninth, nineteen hundred and sixseen, in which I sent you a copy of the

166 telegram of the attorney general instructing me not to give you the grand jury minutes.

I told him that you were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh, and David Slade, in constant conference with you. I said that I believed that every word of the evidence, whether in so-called secret sessions or not, had been placed at the disposal of these worthies, and that I would be just as willing to give the grand jury minutes to a defendant as to give them to your honorable sub-committee.

I told him that I did not share the views which seemed to prevail in your sub-committee on this subject. I said that I regarded a Member of Congress who would take money for an unlawful purpose from any foreign agent as a traitor, and that it was a great pity that such a person could only be indicted under the Sherman Law, which carried only one year in jail as punishment.

I said that it was incomprehensible to me how your honorable sub-committee should rush to the assistance of an indicted defendant;

how you had apparently resolved to prevent prosecution by causing the district attorney in charge to be publicly slandered.

I told him that I would not permit the prosecution of the persons whose cause you had apparently espoused to be impeded by you; I said that if you wanted the minutes of the grand jury in any case, you would not get them as long as I remained in office.

You will observe from the foregoing statement that what Mr. Holme published may have been based on what I said. If you have any quarrel, it is with me, and not with him.

167 It is amazing to me to think that you supposed that I did not understand what you have been attempting to do during your visit here. I realized that your effort was to ruin me and my office by publishing with your full approval the complaints of various persons who have run afoul of the criminal law under my administration. Your sub-committee has endeavored by insulting questions to my assistants and others, by giving publicity and countenance to the charges of rascals and by refusing to listen to the truth and refusing to examine public records to which your attention was directed, to publicly disgrace me and my office.

I propose to make this letter public.

Respectfully,

(Sgd.) H. SNOWDEN MARSHALL,
United States Attorney.

Hon. C. C. Carlin, Chairman Subcommittee of the Judiciary Committee of the House of Representatives, 323 Federal Bldg., New York, N. Y."

The resolution further went on to find that in writing and publishing the letter the relator was guilty of a contempt of the House of Representatives and that when brought to the bar the Speaker should cause to be read to him the findings of fact and law of the Special Committee of the House charged with the duty of investigating into the contempt and that the relator should at that time be heard.

168 The return then stated the circumstances, as follows:

On the 14th day of December, 1915, one Frank Buchanan, a member of the House, preferred charges against the relator herein of the commission of certain high crimes and misdemeanors. On the 28th day of December a grand jury in the Southern District of New York, which had been in deliberation at the time the said Buchanan made his charges, brought in an indictment against the said Buchanan and others charging them with a violation of the provisions of the Sherman Anti-trust law. On the 12th day of January, 1916, the said Buchanan submitted a resolution to the House that the Committee on the Judiciary be directed to inquire into the alleged misconduct of the relator in certain particulars, authorizing the committee to send for persons and papers, to take testimony, etc., in pursuance of such inquiry. This resolution was referred to the Committee on the Judiciary, which proceeded to act upon it. Thereafter, on the 27th day of January, 1916, the chairman of

the Judiciary Committee offered a resolution in the House that said committee be authorized to appoint a special committee to act on behalf of the whole committee to take testimony, with the same powers respecting testimony as the committee at large. This resolution of January 27, 1916, was passed by the House and on the first day of February, 1916, the Chairman of the Judiciary Committee appointed three members, constituting a sub-committee, to investigate said charges.

The subcommittee, when organized, heard the testimony of certain witnesses, and determined to take testimony of other witnesses in the City of New York, which they did, among them one Leonard B. Holme, a reporter, who, on being questioned about a cer-
169 tain statement derogatory to the committee, published in a newspaper and emanating from him, declined to answer as to the sources of his supposed information. On the 4th day of March, 1916, the relator wrote the letter heretofore set forth and delivered it to the Chairman of the subcommittee. Shortly thereafter on the same day he delivered it to the newspapers in the City of New York, wherein it obtained a large and wide circulation, not only in that city but in the District of Columbia and other parts of the United States. The House took action upon this letter on the 5th day of April, 1916, by a resolution appointing a select committee of five to consider the conduct of the relator in writing and publishing the letter. This committee invited the relator to appear before them at the capitol in Washington, which he did, at which time he admitted that he wrote the letter and stated that all of it was true, and that under the same circumstances he would write it again. The committee reported to the House that in their judgment the letter as a whole and in detail was defamatory and insulting and that the relator had been guilty of a contempt of the House in publishing it, whereupon the resolution of June 20, heretofore stated, was passed and the warrant issued as aforesaid.

The report of the select committee to investigate the contempt, which was made to the House on April 14, 1916, is annexed to the return. It contains its findings of fact as already stated, and also the consideration of the law and facts, including a review of the authorities.

The relator does not traverse the return.

John C. Spooner and Charles P. Spooner for the petitioner D. Cady Herrick, Martin W. Littleton and Henry M. Goldfogle for the respondent.

170 LEARNED HAND, *D. J.*:

It was early settled that a commitment by the House of Commons for a contempt and breach of privilege was not examinable by any court. Reg. v. Paty, 2 Ld. Ray, 1105, Alexander Murray's Cases, 1 Wils., 299, Brass Crosby's Case, 3 Wils. 188, Rex v. Hobhouse, 2 Chit. Rep. 207, Burdett v. Abbott, 14 East 1, Case of the Sheriff of Middlesex, 11 Ad. & E. 273. These cases came up in two ways, either by action of trespass against the sergeant-at-arms, as Burdett

v. Abbott, supra, or more generally by habeas corpus, either after judgment as Brass Crosby's Case, or after arrest, as Reg. v. Paty, supra, Alexander Murray's Case, supra, and the Case of the Sheriff of Middlesex, supra. It was even unnecessary to state, so high did the Commons carry their prerogative, the grounds of the commitment, Reg. v. Paty, supra, p. 1106 per Gould, J. Indeed, the contempt in that case was for precisely the same act which the House of Lords had declared to be legal in Ashby v. White, 2 Ld. Raym. 938. Perhaps the strongest assertion of the immunity of the Commons in their judgments for contempt is to be found in the litigation of which the great case of Stockdale v. Hansard, 9 Ad. & E. 1, was the beginning. There the Queen's Bench decided that a resolution of the Commons directing Hansard, their printer, to distribute generally their proceedings, would not protect him in an action of libel. The question was argued and considered at great length in the judgments of all the judges, how far the resolution of the House of Commons was beyond their scrutiny and whether their prerogative was exempt from judicial control. After judgment the Commons did not appeal and the Sheriff levied and collected from Hansard but had not paid over to the plaintiff, when the
171 Commons issued a warrant for the Sheriff of Middlesex as for a contempt in making the levy, and committed both gentlemen to the tower. The unhappy Sheriff applied to the court thereupon for habeas corpus to which the lieutenant of the Tower returned that he held them by warrant of the Speaker for contempt and a breach of privilege. He set out the warrant which did not specify the nature of the contempt, and after full consideration the same court with one exception, that decided Stockdale v. Hansard, supra, remanded the prisoners to the Tower, Case of the Sheriff of Middlesex, supra. Certainly the prerogative of the House had been vindicated.

The grounds repeatedly given for this immunity from control are that the House is a court and a high court with whose judgments no other court can interfere. At times the prerogative is merely put upon the traditional custom of the House, lex et consuetudo Parliamenti. Some judges, as De Grey, C. J., in Grass Crosby's Case, supra, went so far as to say generally that the Commons were a final judge of all their prerogative, a dictum clearly overruled in Stockdale v. Hansard, supra. I do not, however, understand the language, which rests the power of the House of Commons in contempt, to indicate that they need be in the discharge of a judicial duty when the contumacious act occurs. The passengers in Mr. Justice Miller's opinion in Kilbourn v. Thompson, 103 U. S. 168, which refers to this language, are not to be so understood. It is rather that in the exercise of their power to punish for contempt they act as a court and as such cannot be reviewed by another court. In none of the cases does it appear that the House was engaged in judicial duties except perhaps in Reg. v. Paty, supra. The right of the House to be so regarded itself rests upon immemorial custom.

172 That the power to punish for contempt is not inherent, according to English notions, in any legislative assembly, is, however, shown by the treatment of contempts of provincial assemblies by the Privy Council. At first it *se* to have been supposed that they had such powers. An editor in the Island of Jamaica published matter which was held by the Assembly to be a "breach of privilege." Just what does not appear. For this he was committed by that body, and afterwards sued the sergeant-at-arms and the speaker. Baron Parke, who delivered the judgment upon appeal, Beaumont v. Barrett, 1 Mo. P. C. 59, rested the power, which the court upheld, upon the inherent right of all legislative assemblies to protect themselves not only against direct impediments to the exercise of their duties, but against libels reflecting upon their authority. This decision was overruled, however, in Kielly v. Carson, 4 Moo. P. C. 63, where Baron Parke also delivered the judgment of the court. In that case Kielly had threatened a member of the Newfoundland House of Assembly outside the meeting place itself. When brought before the House he repeated his contumelious conduct and indeed seems to have redoubled it. He was committed, and he sued in trespass on his release. Baron Parke excluded from consideration so much of the contempt as occurred before the House, because the justification was in bar, and if the original arrest was illegal, it was no bar. He thought that such an assembly had the power to protect themselves against impediments to their procedings, but not to punish past misconduct. This decision was followed in Fenton v. Hampton, 11 Moo. P. C. 347, where the Supreme Legislative Assembly of Van Dieman's Land had committed for contempt a witness who refused to testify at an
173 inquiry, instituted, apparently with full authority by that body. It was also followed in Doyle v. Falconer, L. R. 1 P. C. 328, where the Assembly of the Island of Dominica had committee a member for abusive language before the House directed to the Speaker. The right of a provincial assembly to protect itself from "direct impediment" would seem, therefore, to go hardly further than to remove the offender.

The first case in this country appears to be Anderson v. Dunn, 6 Wheat. 204, where in an action of trespass against the sergeant at arms of the House of Representatives the Supreme Court held good a plea in bar justifying under the warrant of the Speaker directing the arrest of the plaintiff generally for a breach of privilege of the House and for a contempt of its dignity and authority. The plea recited that the imprisonment under the warrant continued till the House had concluded its inquiry and had found the plaintiff guilty, after which he was reprimanded and discharged. The plea did not show the nature of the contempt and the decision is open to several possible explanations, one of which may be that since the House had the power of a court to punish for some contempts and in so doing acted judicially, no other court could examine the judgment. If so, it is certainly overruled by Kilbourne v. Thompson, 103 U. S. 168. In that case, however, the plea stated the nature of the contempt, and possibly Anderson v. Dunnis to be therefore distin-

guished, as indicated on page 229 of the opinion, upon the theory that the plea was consistent with a contempt in the presence of the House. Whether the plea ought not to have been invalid, unless it alleged a good defense under all the possible cases covered by its broad language is a question of pleading which is, with de-
174 ference, extremely doubtful, but nevertheless that may have been the basis of the decision. In any case the power, however broad, was sustained upon its inherent necessity to protect the House in the exercise of its duties. I do not regard it as deciding more than that there are some cases in which such a power exists.

Ex parte Nugent, 18 Fed. R. 10,375, was a case of habeas corpus to release the relator under the following circumstances. The Senate was deliberating upon a treaty in secret session and some one unknown disclosed certain particulars to the relator, a reporter for the New York Hearld. The reporter was summoned before the bar of the Senate, was sworn and refused to answer certain questions relevant to the discovery of the person from whom he had got his information. For this he was committed to the sergeant-at-arms until further order. The court, the Circuit Court of the District of Columbia in banc, held that the commitment of the Senate was not reviewable by a court, in analogy with the practices of the Houses of Parliament, but that, if it were, at least it appeared that the Senate was acting in a matter over which it had full powers and that the inquiry and contempt as a means of affecting the inquiry were incidents to the discharge of its constitutional powers.

Kilbourn v. Thompson, 103 U. S. 168, was an action of trespass against the sergeant-at-arms, the Speaker and several members of the House of Representatives. The House had instituted an inquiry into the existence of a "real estate pool" which it thought to be connected with a debt due the United States. The debtor, Jay Cooke &
175 Co., had become bankrupt and its trustee had effected a settlement of its affairs. The House passed a resolution appointing a committee to inquire into the settlement in question and into the relation of the "pool" with the debtor's property. The committee summoned the plaintiff before them and asked him the names of the "pool" members and to produce certain records. He refused and was committed to the sergeant-at-arms who held him for about six weeks and then delivered him to the Marshal of the District Court. These facts being set up in bar, the plaintiff demurred. The Supreme Court sustained the demurrer in an opinion by Mr. Justice Miller.

The exact scope of the decision is no more than to hold that the House's commitment was not conclusive upon the court, at least until it appeared that the House was engaged upon an inquiry within its constitutional powers, and that the inquiry in question was not such. In the discussion it was said that the privileges of the House were not to be gathered in any way from English parliamentary precedents which depended upon the customs of the several houses, and especially upon the fact, recited in many of the opinions of English judges, that the House of Commons, as well as the House of Lords, was a court and as such enjoyed the immunity from review of its

procedings by another court which was always accorded to judicial proceedings.

The question whether the House of Representatives had any powers to commit as a for a contempt in the exercise of its legislative duties was expressly reserved from consideration, p. 189, but it
176 was thought, p. 190, that in proceedings for impeachment either House would have the same powers as a court in relation to the production of testimony, and perhaps also if engaged in a contested election of its members, as to which it was given full judicial powers. That the court supposed the action of the House in preferring articles of impeachment including the preliminary inquiry for that purpose, to be judicial in its character seems to me clearly indicated in the opinion pp. 184, 190, 191. This ought perhaps to foreclose any further discussion, but as the language was certainly obiter I shall discuss the question later.

In Interstate Commerce Commission v. Brimson, 154 U. S. 447, 485, the court obiter likewise said that the powers of Congress to impose a fine and imprisonment were confined to the exercise by either House of its right to punish disobedient behavior of its members and to procure testimony in election and impeachment cases and in cases which might involve the existence of the House themselves. In In Re Chapman, 166 U. S. 661, it was said obiter, pp. 671 and 672, that both Houses had the unquestioned right to treat as a contempt a refusal to answer proper questions put to a witness in a constitutional inquiry instituted by them.

The state of the law, so far as decided, therefore, seems to be only this: that the House of Representatives has not inherited the prerogative in matters of contempt of the House of Commons, and that its commitments are open to inquiry, at least to the extent of discovering whether the commitment was an incident to the exercise of some constitutional power. Nevertheless, it has a limited power to commit and in the exercise of that power it enjoys immunity
177 *of* from review by a court which necessarily has no appellate jurisdiction. The last statement is certainly the law if any part of Anderson v. Dunn, supra, survives, which I think it does. The question in this case, therefore, is of first impression in spite of all the decisions which have been cited. It turns, I think, upon three considerations: first, whether the House was engaged upon a constitutional duty; second, whether in that duty it had any powers to punish for contempt; third, whether that power went beyond compulsion to produce testimony and included the power to punish contumacious language directed against itself, and published while the matter was still under consideration.

That the House was in fact engaged in a constitutional inquiry admits of no doubt. The resolution submitted to the Judiciary Committee was aimed at the impeachment of the relator, and the subcommittee was charged with duties, ancillary to that inquiry. Of course, the manner of the discharge of those duties by the subcommittee is not relevant to the case now at bar so long as they assumed to be acting under the resolution. It was faintly suggested on the argument that contumelious language directed towards the subcom-

mittee was different from that directed to the House as a whole, but I scarcely think that question deserves much discussion, and I pass it by.

The next question is whether the House has any powers of punishing contempts, and that I deem settled by the uniform expressions of the Supreme Court. It is true that except Anderson v. Dunn, supra, there has been no decision upon that question, but the power has always been presupposed in all the discussions and the question throughout has concerned its limitations. Therefore, it
178 would altogether misconceive the effect of those decisions to take them as going so far as Fenton v. Hampton, supra, or Doyle v. Falconer, supra. There may indeed be some question even of the power to compel the production of evidence when engaged in a purely legislative matter, though even then the reservation made in Kilbourn v. Thompson, supra, seems matched by the language in In Re Chapman, supra. When engaged in an impeachment, however, there can be no question that the House has some such powers, at least for the production of evidence, unless the language is to be disregarded even of Kilbourn v. Thompson, supra, which most straitly confined its powers.

The case at bar does not, however, concern the House's power to compel the production of evidence,, but the power to protect itself against the pressure which may arise from insult, abuse, or clamor while deliberating upon the finding of articles of impeachment. It will not, I think, be questioned that at common law it was a contempt of court to assail the motives and conduct of a court, at least while the matter was pending and open. Such was early held to be the rule in Federal Courts, Hollingsworth v. Duane, 12 Fed. Cas. 6616, United States v. Duane, 25 Fed. Cas. 14,997, and such indeed has been held, even after Revised Statutes Sec. 725, United States v. Toledo Newspaper Co., 220 Fed. R. 458, provided the publication be calculated to obstruct the administration of justice. I should not doubt that if Revised Statutes Sec. 725 do not apply a court has such a power. The question here is, therefore, whether the House while so engaged has the powers of a court. Suppose, for example, that during the trial of an impeachment, in the Senate, someone should publicly threaten the members unless they decided as he
179 thought just, and suppose such threats were spread broadcast and greatly inflamed public feeling. I should have no question of the Senate's power to inquire into the case and punish the offender. the Senate in such a case is clearly a court and by analogy would have the common powers of a court when not legally abridged. If so, the letter of the relator if addressed to the Senate or to a Senator while engaged in such a trial would be cognizable in the same way, because the question as to how far it in fact touched the court in the exercise of its duties would be involved in the power to decide the case at all, nor would a co-ordinate court undertake to determine whether the gravity of the aspersions upon the Senate was enough to affect its conduct, assuming that that is the heart of the evil.

Now there is no difference between the case supposed and that at

bar, except that the House was not engaged in a trial, but in considering the preferring of articles. The relator insists that in that capacity they have none of the powers of a court for their function is not judicial. I take it that when trying their own members for expulsion or admission or for misconduct there could be no doubt, unless they are not to have the common-law powers of a court, but the case at bar is not quite that. It is, indeed, unwise to attempt any rigid definition of what is executive, or legislative or judicial. The distribution of such functions has in no country, not even in our own, been by ä priori rules of political dogmatism. Executives make ordinances and try and dismiss their inferiors, legislatures determine facts from evidence and try their members, judges constantly make new rules of law with prospective validity. Yet it is true that in the main courts are concerned with the de-
180 determination of existing facts and with deciding how far they fit into existing authoritative rules. But it by no means follows that courts must always dispose of the controversy before them; they may at times do no more than determine that a trial must go on elsewhere. A judge who hears a criminal complaint and decides only that the defendant shall be held for trial, acts as much as a court as when later he sits with a jury and both finally dispose of the matter. He hears the evidence, decides what it proves and whether the facts count in law. A grand jury jerforms exactly the same duties as a petit jury, except that its hearing is usually ex parte and it need not be so clear in its convictions. It has always been treated as a part of the court, and its presentments law and foundation for contempts. An impeaching body is*n* in this class; its duties require it to do what the tribunal of trial must do though the consequences be different. It is true that it may only put the respondent to a trial but this is not always the limit of its powers. There is, for example, in the constitution of the State of New York (Art. VI. Sec. 137), a provision which suspends an impeached judge until he is acquitted. It would be an extreme position to assert that a House whose impeachment had that result was not acting judicially, yet it would be capricious to say that if the judge was not suspended, but must only stand trial, the character of the duties is changed.

That the finding of such articles is a judicial undertaking indeed seems to me too clear for question. Still it does not follow that the House has the powers of a court whenever it acts judicially. As suggested by the relator, a District Attorney who is examining into a proposed prosecution may be acting judicially, but he certainly has not the powers of a court. In the absence of any pre-
181 cedents it might indeed be a matter of doubt, though I confess that it would seem to me arbitrary to deny the powers customary to courts to a body of equal dignity with any court while it was acting judicially. But the case is not bare of precedents, because the presupposition in all cases is that the House when judicially engaged has the powers of a court. The question about which differences have arisen is only whether there can be any scrutiny of the nature of the duties upon which it is engaged. I can see no

reason for curtailing the customary extent of the power to commit in the case of the House below what courts themselves enjoyed at common-law, unless it were based upon suspicion of the possible greater abuses of such powers. That would be, of course, an admissible consideration if it were true, and it is happily not justified in history. While, therefore, as I have said, there is no actual decision upon the point raised, it seems to me that there is both reason and precedent for the position that the House, while deliberating upon articles of impeachment, has jurisdiction to determine whether a publication is a contumacious assault upon its freedom of action. If so, the warrant in the case at bar was within its jurisdiction. I should have no right to express any opinion upon the letter or whether it justifies any punitive action by the House; that lies within its own exclusive determination. It certainly touched the conduct of certain of its members in their judicial duties and it may be judged to be of a character likely to affect them in the discharge of those duties. The questions whether the conduct of those members was such as justified the comment, and, if so, whether the dignity of the House suffers more by the punishment of a just indignation, than by a recognition of its justice, are quite without the scope of this inquiry; once the power be recognized they are comprised in its exercise.

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I am, of course, aware that the implications of such a holding are to make it possible for the House to treat as a contempt criticism of its conduct pending impeachments by the press generally. Such a power involves the possibility of abuse like every other power, especially when in the hands of one who is at once the judge and the victim. On the other hand it must be conceded that the absence of such power puts the House at the mercy of a public pressure that may at times actually prevent a fair and impartial determination of an individual's rights. It may be better that such offenses should come before a separate tribunal unaffected by the sting of personal insult, but there is at present no such tribunal. It has been the traditional method of the law we have inherited to trust to the mag-animity of courts to disabuse themselves of such motives. Perhaps that policy is too trustful of human nature, but I certainly have no right to assume that the House of Representatives are less capable of exercising as much self-restraint as any other official charged with kindred duties. Indeed, the public resentment which an abuse of such powers is apt to bring may well be a more effective means of control upon a popular body, than upon courts whose tenure exempts them from the immediate effects of their conduct.

Finally, it must be remembered that public criticism of courts has in any event no propriety until the case be decided. The ruling in the case at bar does not imply the right of the House to treat as a contempt statements made while legislative questions are pending before it. At such times discussion and criticism are indispensable; it is useful that the conflict of public interests, of which legislation is a legitimate resultant, should be vocal and free.

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Where, however, the duty is judicial, the case is quite different. In such cases a habit of public appeal breeds a state of mind in

the tribunal at variance with the first duties of a judge, and any value it could have, even in extreme cases, is not a counterweight to the dangers of its recognition as lawful.

In fact, however, all such matters are beside the point, if the power be fairly deducible from the existing law. This I think it is, and if so, speculation upon its value is irrelevant.

The relator will be remanded to the custody of the sergeant-at-arms and the writ dismissed.

L. H., *D. J.*

July 19, 1916.

(Filed July 19, 1916.)

184 *Order Dismissing Writ.*

At a Term of the District Court of the United States for the Southern District of New York, Held in the Post-office Building, in the City of New York, on the 21st Day of July, 1916.

Present: The Honorable Learned Hand, Judge.

UNITED STATES ex Rel. H. SNOWDEN MARSHALL
against
ROBERT B. GORDON, Serjeant-at-arms of the House of Representatives of the United States.

A writ of habeas corpus having been issued out of this court, granted by Hon. Augustus N. Hand, one of the judges, directed to Robert B. Gordon, the Serjeant-at Arms of the House of Representatives of the United States, requiring him to produce the body of H. Snowden Marshall before this court, and the said Serjeant-at-Arms having pursuant to the writ produced said H. Snowden Marshall and made a return to the writ from which it appears that he arrested said Marshall by virtue of a warrant duly issued by the House of Representatives of the United States, and signed by the Speaker of the House; and the court having ordered, on consent of both parties, that the return might be amended and that further and supplemental return to the writ might be made by the Serjeant-at-Arms as he or the House might be advised; and the court having directed that said H. Snowden Marshall should be allowed to go upon his own recognizance pending the hearing of the writ; and
185 the said Robert B. Gordon, Serjeant-at-Arms, as well as for himself and as the respondent herein on behalf of the House of Representatives, having made and filed an amended and further return to the said writ of habeas corpus, and no traverse thereto having been made by the relator; and the hearing on said writ having duly and regularly come on to be heard,

Now, after hearing John C. Spooner and Charles P. Spooner, Esqs., of counsel for the relator in support of said writ, and D. Cady Herrick, Martin W. Littleton and Henry M. Goldfogle, Esqs.,

of counsel for the respondent in opposition thereto, and upon reading and filing the said writ, the petition of H. Snowden Marshall, on which it was granted, and the return of the respondent and the several orders made thereon, and the amended return of the respondent herein, and due deliberation having been had thereon,

It is, on the motion of D. Cady Herrick, Martin W. Littleton and Henry M. Goldfogle, Esqs., the attorneys for the respondent,

Ordered, that the aforesaid writ of habeas corpus be and it hereby is dismissed; and upon the motion of said relator it is

Further ordered that the relator be retained in the custody of the court on his own recognizance until the first of December, 1916, provided that an appeal be taken on or before August 15, 1916, and if no appeal be taken on or before August 15, he be on that day remanded to the custody of the Serjeant-at-Arms; and if an appeal be taken on or before that day, he be remanded to the custody of the Serjeant-at-Arms on the first day of December, 1916.

LEARNED HAND, *D. J.*

Filed Jul. 22, 1916. S. D. of N. Y.

186 District Court of the United States for the Southern District of New York.

UNITED STATES ex Rel. H. SNOWDEN MARSHALL
against
ROBERT B. GORDON, Sergeant-at-Arms of the House of Representatives of the United States.

Assignment of Errors.

In the Matter of the Petition of H. SNOWDEN MARSHALL for Writ of Habeas Corpus.

Comes now the petitioner and appellant, H. Snowden Marshall, by John C. Spooner and Charles P. Spooner, his attorneys and counsel, and in connection with his petition for the allowance of an appeal to the Supreme Court of the United States from the order of this Court entered the 22d day of July, 1916, discharging the writ of habeas corpus heretofore sued out by him and remanding him to custody, makes and files the following assignment of errors: The Court erred:

(1) In discharging the said writ of habeas corpus and remanding the petitioner to custody;

(2) In holding that the petitioner's restraint and detention under the warrant mentioned in the petition was not without authority under the Constitution and laws of the United States;

(3) In holding that the petitioner was not deprived of his liberty under the said warrant in violation of his rights, privileges
187 and immunities under the Constitution and laws of the United States;

(4) In holding that the said Robert B. Gordon, Sergeant-at-Arms of the House of Representatives of the United States under the Constitution and laws of the United States had authority under and by virtue of the order or warrant signed by the Speaker of the House of Representatives of the United States and mentioned in the petition, to take the petitioner in custody and bring him to the bar of said House to answer the charge that petitioner, on March 4th, 1916, in the City of New York, did write and publish a certain letter and did thereby violate the privileges of the House of Representatives and commit a contempt of the House of Representatives;

(5) In refusing to hold that the House of Representatives was without lawful authority under the Constitution and laws of the United States to issue said warrant or order and to execute the same against the petitioner;

(6) In holding that the writing and publishing of said letter constituted an act of which the House of Representatives under the Constitution and laws of the United States and jurisdiction to try or punish the petitioner;

(7) In holding that the resolution of the House of Representatives of June 20th, 1916, pursuant to which said warrant was issued, was authority in law and under the Constitution of the United States for the issuance of said warrant and the arrest of the petitioner thereunder;

(8) In not holding that the House of Representatives was under the Constitution and laws of the United States without jurisdiction to try or punish petitioner for the writing and publishing of said letter as charged in said resolution of June 20th, 1916.

Wherefore the petitioner prays that the order discharging said writ of habeas corpus and remanding the prisoner to the custody
188 said Robert B. Gordon, Sergeant-at-Arms as aforesaid, be reversed and that the petitioner be discharged from custody.

Dated, July 28, 1916.

H. SNOWDEN MARSHALL,
Petitioner.

JOHN C. SPOONER,
CHARLES P. SPOONER,
Attorneys for Petitioner,

14 Wall street, Borough of Manhattan, New York, N. Y.

(Filed July 28, 1916.)

189 District Court of the United States for the Southern District of New York.

UNITED STATES ex Rel. H. SNOWDEN MARSHALL
against
ROBERT B. GORDON, Sergeant-at-Arms of the House of Representatives of the United States.

In the Matter of the Petition of H. SNOWDEN MARSHALL for a Writ of Habeas Corpus.

Petition and Allowance of Appeal.

H. Snowden Marshall, feeling aggrieved by the order of this Court made on the 22nd day of July, 1916, dismissing the writ of habeas corpus heretofore allowed comes now by his attorneys John C. Spooner and Charles P. Spooner and petitions this Court for an order allowing him to prosecute an appeal from the said final order to the Supreme Court of the United States according to the laws of the United States in that behalf made. Your petitioner feels there are grave doubts concerning the legality under the Constitution of the United States, among other things, of his restraint and detention under the order or warrant signed by the Speaker of the House of Representatives of the United States, mentioned in his petition for the said writ, and the validity and regularity of the proceedings referred to in said petition and desires in good faith to submit these questions as more fully appears from his assignment of errors now on file to the Supreme Court for their determination, and your petitioner will ever pray.

JOHN C. SPOONER,
CHARLES P. SPOONER,
Attorneys for Petitioner.

The foregoing appeal prayed for is hereby allowed.

JULIUS M. MAYER,
U. S. D. J.

Dated, New York, N. Y., July 28, 1916.

(Filed July 28, 1916.)

190 District Court of the United States for the Southern District of New York.

UNITED STATES ex Rel. H. SNOWDEN MARSHALL
against
ROBERT B. GORDON, Sergeant-at-Arms of the House of Representatives of the United States.

In the Matter of the Petition of H. SNOWDEN MARSHALL for a Writ of Habeas Corpus.

Notice of Appeal.

Please take notice that H. Snowden Marshall, petitioner above named, hereby appeals to the Supreme Court of the United States from the final order made and entered herein on the 22nd day of July, 1916, discharging the writ of habeas corpus herein, and from each and every part of the said order.

Dated July 28, 1916.

JOHN C. SPOONER,
CHARLES P. SPOONER,
Attorneys for Petitioner.

To: Henry M. Goldfogle, Esq., Attorney for Respondent, 271 Broadway, New York, N. Y.
Alex. Gilchrist, Jr., Clerk U. S. District Court, Southern District of New York.
(Filed July 29, 1916.)

191 By the Honorable Julius M. Mayer one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To Robert B. Gordon, Sergeant-at-Arms of the House of Representatives of the United States.

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the Capitol, in Washington, District of Columbia on the 26th day of August, 1916, pursuant to a petition, allowance and notice of appeal filed in the Clerk's office in the District Court of the United States for the Southern District of New York, wherein H. Snowden Marshall is the appellant and you are the appellee, to show cause, if any there be, why the final order of the said District Court in such petition, allowance and notice of appeal mentioned should not be corrected and justice done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 28th day of July, in the year of Our Lord One thousand nine hundred and sixteen, and of the Independence of the United States the One hundred and forty-first.

JULIUS M. MAYER,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

(Filed July 29, 1916.)

192 United States District Court, Southern District of New York.

In the Matter of the Petition of H. SNOWDEN MARSHALL for Writ of Habeas Corpus.

Stipulation of Counsel.

Pursuant to Rule 8 of the Supreme Court of the United States, it is hereby stipulated that the foregoing Petition, Writ of Habeas Corpus, Amended Return, Opinion, Order Dismissing Writ, Assignment of Errors, Petition and Allowance of Appeal, Notice of Appeal, Bond and Stipulation as to Record constitute the transcript of Record on Appeal and that the Clerk of the United States District Court for the Southern District of New York may so certify and transmit the same to the Supreme Court of the United States pursuant to said Allowance of Appeal.

Dated, July —, 1916.

JOHN C. SPOONER,
CHARLES P. SPOONER,
Attorneys for Appellant.
HENRY M. GOLDFOGLE,
Attorneys for Respondent.

193 UNITED STATES OF AMERICA,
Southern District of New York, ss:

In the Matter of the Petition of H. SNOWDEN MARSHALL for Writ of Habeas Corpus.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 2d day of August in the year of our Lord one thousand nine hundred and sixteen and of the Independence of the said United States the one hundred and forty-first.

[Seal District Court of the United States, Southern District of New York.]

ALEX. GILCHRIST, JR. *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, cancelled 3/2-16. A. G. Jr.]

TORN PAGES

194 By the Honorable Julius M. Mayer, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to Robert B. Gordon, Sergeant-at-Arms of the House of Representatives of the United States:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the Capitol, in Washington, District of Columbia, on the 26th day of October, 1916, pursuant to a petition, allowance and notice of appeal lodged in the Clerk's office in the District Court of the United States for the Southern District of New York, wherein H. Snowden Marshall, above appellant and you are the appellee, to show cause, if any there be, why the United States why the final order of the said District Court in such petition, allowance and notice of appeal mentioned should not be corrected and such justice done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 28 day of July, in the year of Our Lord One thousand nine hundred and sixteen, and of the Independence of the United States the One hundred and forty-first.

JULIUS M. MAYER,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

195 [Endorsed.] M. 2/90. District Court of the U. S., Southern District of New York. United States ex Rel. H. Snowden Marshall against Robert B. Gordon, Sergeant-at-Arms, etc. In the Matter of the Petition of H. Snowden Marshall for writ of habeas corpus. Original Citation. John C. Spooner, Charles P. Spooner, Attorneys for Petitioner, 14 Wall Street, Borough of Manhattan, City of New York. Service of a copy of within admitted July 28, 1916. H. M. Goldfogle, Att'y for Respondent. U. S. District Court, S. D. of N. Y. Filed Jul- 29, 1916.

Endorsed on cover: File No. 25,436. S. New York D. C. U. S. Term No. 606. H. Snowden Marshall, appellant, vs. Robert B. Gordon, Sergeant-at-Arms of the House of Representatives of the United States. Filed August 8, 1916. File No. 25,436.

TORN PAGES

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 606.

H. SNOWDEN MARSHALL,
Appellant,
against
ROBERT B. GORDON, Sergeant-at-Arms of the House of Representatives of the United States,
Appellee.

Sirs:

PLEASE TAKE NOTICE that the annexed motion to advance the argument in the above numbered and entitled appeal will be submitted to the Supreme Court of the United States for the decision of the Court thereon at its court room in the City of Washington, District of Columbia, on Monday, October 9, 1916, at the opening of court on that day, or as soon thereafter as counsel can be heard.

Dated, New York, September 28th, 1916.

D-CADY HERRICK,
HENRY M. GOLDFOGLE,
MARTIN W. LITTLETON,
Attorneys for Appellee.

To

Messrs. JOHN C. SPOONER and CHARLES P. SPOONER,
Attorneys for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 606.

H. SNOWDEN MARSHALL,
Appellant,

against

ROBERT B. GORDON, Sergeant-at-Arms of the House of Representatives of the United States,
Appellee.

Now comes Robert B. Gordon, appellee, and shows to this Court:

1. That this is an appeal from an order of the United States District Court for the Southern District of New York dismissing a writ of habeas corpus sued out by appellant (Trans. pages 151, 152). The facts culminating in the granting and dismissing of the writ of habeas corpus are hereinafter briefly set forth.

2. On the 12th day of January, 1916, while the House of Representatives of the United States was in session, a resolution was introduced therein impeaching appellant by charging him as United States District Attorney with the commission of high crimes and misdemeanors and with misfeasance and malfeasance in office (Trans. page 35); that said resolution was referred by the House of Representatives to the Committee on the Judiciary

for its action, and said committee was required by the terms of said resolution to inquire and report whether action of the House was necessary concerning the alleged official misconduct of appellant described in said resolution (Trans. pages 37-39).

3. On the 27th day of January, 1916, the House of Representatives passed a resolution giving the Committee on the Judiciary, in continuing its consideration of said impeachment resolution, power and authority to subpoena witnesses and to examine them under oath, as well as authority to appoint a subcommittee to act for and on behalf of the committee of the whole wherever it should be deemed advisable by said sub-committee to take testimony, said resolution conferred upon said subcommittee when appointed the same powers with respect to obtaining testimony as was given to the Committee on the Judiciary (Trans. page 40).

4. On the 1st day of February, 1916, the Judiciary Committee, pursuant to the authority conferred on it as aforesaid, appointed a subcommittee to investigate further for the committee and the House of Representatives the charges against appellant set forth in said impeachment resolution (Trans. page 40). That while said subcommittee, pursuant to the aforesaid authority, was taking the testimony of witnesses in the City of New York on the subject matter of said charges, appellant wrote, published and caused to be transmitted to the chairman of said subcommittee the letter dated March 4, 1916, a copy of which is set forth in Exhibit "A" hereto annexed; that at the same time or before the said letter was sent to the chairman of said subcom-

mittee it was given by appellant to the daily newspapers for publication, and was thereafter published by them in newspapers which had a large circulation throughout the City of New York, the District of Columbia and other parts of the United States (Trans. pages 15, 20, 21). That said letter written by appellant as aforesaid was thereafter submitted by the said subcommittee to the Committee on the Judiciary, and on the 5th day of April, 1916, the Committee on the Judiciary submitted to the House of Representatives its report, which sets forth all the facts and circumstances surrounding the writing of said letter by appellant; that thereafter on the 5th day of April, 1916, the House of Representatives adopted a resolution providing for the appointment of a select committee of five members to consider said report or statement of the Committee on the Judiciary and to report to the House the facts in the case with the violations, if any, of the privileges of the House of Representatives, or of the subcommittee thereof, the power of the House to punish for contempt and the procedure in contempt proceedings in case they found a contempt had been committed, to the end that the privileges of the House be maintained and the rights of members protected in the performance of their official duties (Trans. page 29).

5. That thereafter the Speaker of the House, pursuant to said resolution, appointed a select committee, consisting of five members, to carry out and perform the purposes and objects of said resolution (Trans. page 23); that said committee organized and proceeded to take testimony on the subject matter of said resolution, and on April 14, 1916,

made its report to the House of Representatives in which it found, among other things, that appellant against whom said impeachment proceeding was pending, without cause, published in the New York Times the letter dated March 4, 1916, a copy of which is set forth in Exhibit "A"; that said committee concluded and found that said letter was as a whole and in several separate sentences thereof defamatory and insulting and tended to bring the House of Representatives into public contempt and ridicule, and that appellant by writing and publishing said letter was guilty of a contempt of its privileges (Trans. page 42); it further found that the purposes for which said letter was written and published was to defame and bring into contempt the subcommittee having under investigation the impeachment charges against appellant (Trans. page 42). For the purpose of trying appellant before the House of Representatives for such contempt the committee recommended the adoption of the resolution, a copy of which is set forth in the warrant issued by the House for the arrest of appellant (Trans. page 46); said resolution was thereafter duly adopted (Trans. page 24); that thereafter on the 22nd day of June, 1916, the warrant, Exhibit "A," was duly issued by the proper officers of the House of Representatives and delivered to appellee, as Sergeant-at-Arms of said House, commanding him forthwith to take into his custody the body of appellant and to bring him before the bar of the House to answer the charge of having violated the privileges of the House (Trans. pages 27, 5).

That on the 26th day of June, 1916, appellee arrested appellant and took him into custody under

and by virtue of the warrant aforesaid (Trans. page 5); that thereafter on the same day appellant presented to the District Court of the United States for the Southern District of New York a petition in which he set forth, among other things, that the writing and publishing of the letter dated March 4, 1916, was not a contempt of the House of Representatives or a breach of its privileges; that the House of Representatives was without jurisdiction to try or punish appellant for said act, and was without power or right to arrest appellant to answer the charge of contempt based on the writing of said letter, and that the arrest and detention of appellant under said warrant was without due process of law and in violation of his constitutional rights (Trans. page 1); that the petition for a writ of habeas corpus was granted (Trans. page 4); and the writ was thereafter duly issued and served on appellee commanding him to have the body of appellant before the District Court of the United States for the Southern District of New York forthwith, together with the time of the imprisonment and cause of detention (Trans. page 4); that appellee filed a return in which all of the facts relating to the issuance of said warrant of arrest by the House of Representatives are fully set forth (Trans. pages 5, et seq.), which return was not traversed by appellant.

6. That the question of the power of the House of Representatives to issue said warrant and to try and punish appellant for contempt was argued before the District Judge for the Southern District of New York on the 6th day of July, 1916; that thereafter on the 21st day of July, 1916, an order was made dismissing the writ of habeas corpus,

which order provided, among other things, as follows:

> "Further ordered that the relator be retained in the custody of the Court on his own recognizance until the first of December, 1916, provided that an appeal be taken on or before August 15, 1916, and if no appeal be taken on or before August 15, he be on that day remanded to the custody of the Sergeant-at-Arms; and if an appeal be taken on or before that day he be remanded to the custody of the Sergeant-at-Arms on the first day of December, 1916" (Trans. page 149).

That said provision was inserted in said order for the purpose of expediting the appeal herein so that this Court, if it so desired, would be able to hear and dispose of this appeal before the expiration of the 64th Congress on March 4, 1917, for the reason that there existed grave doubt in the mind of the Court below of the power of the House of Representatives of a succeeding Congress to punish appellant for a contempt committed against the House of Representatives of the 64th Congress.

7. The assignment of errors herein raises the question of the power of the House of Representatives to arrest, try and punish appellant for a contempt and breach of its privileges by writing and publishing the letter dated March 4, 1916 (Trans. page 149).

8. Appellee contends that the House of Representatives of a succeeding Congress cannot punish

appellant for a contempt committed against the House of Representatives of the present Congress; that unless this appeal is decided by this Court before the expiry of the present Congress in March, 1917, only a moot question will be presented for the consideration of this Court and the House of Representatives will thereby be deprived of the right to try appellant on the contempt charges set forth in said warrant. Appellee respectfully suggests that this appeal should be argued and decided at the earliest opportunity so that the House of Representatives will have time to try appellant under said warrant before the 64th Congress expires in March, 1917.

9. Appellant concurs in this motion to advance.

WHEREFORE, appellee prays that the argument of the appeal herein may be advanced and set down for an early date.

Dated, New York, September 28th, 1916.

D-CADY HERRICK,
HENRY M. GOLDFOGLE,
MARTIN W. LITTLETON,
Attorneys for Appellee.

Exhibit "A."

WARRANT.

House of Representatives,
United States of America,
June 22, 1916.

To Robert B. Gordon,

Sergeant at Arms, GREETING:

The following resolution was, on June 20, 1916, adopted by the House of Representatives, to wit:

RESOLVED, That the Speaker do issue his warrant, directed to the Sergeant at Arms, commanding him to take in custody, wherever to be found, the body of H. Snowden Marshall, of the State of New York, and to proceed forthwith to bring the said H. Snowden Marshall to the bar of the House of Representatives, to answer the charge that he, on March fourth, nineteen hundred and sixteen, in the City of New York, did violate the privileges of the House of Representatives of the United States by writing and causing to be published the following letter:

"Department of Justice,

"United States Attorney's Office,
"New York, March 4, 1916.

"Sir: Yesterday afternoon, as I am informed, your honorable committee ordered the arrest of Mr. L. R. Holme, a representative of a newspaper

which had published an article at which you took offense. The unfortunate geneleman of the press was placed in custody under your orders. He was taken to the United States Marshal to be placed in confinement (I do not understand whether his sentence was to be one day or a dozen years). The marshal very properly declined to receive the prisoner. This left you at a loss, and I am advised that you tried to work your way out of the awkward situation by having Mr. Holme brought back and telling him that you were disposed to be 'kind' to him and then discharged him for the purpose of avoiding unpleasant consequences to yourselves.

"You are exploiting charges against me of oppressive conduct toward a member of your honorable body who is charged with a violation of law and of oppressive conduct on my part toward shysters in the blackmailing and bankruptcy business.

"I may be able to lighten your labors by offering to resign if you can indicate anything I ever did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.

"The supposed justification of your order that Mr. Holme be placed in custody was his refusal to answer the question you asked as to where he got the information on which was based the article which displeased you.

"It is not necessary for you to place anyone under arrest in order to get the answers to the question which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which he published and from which he made deductions, so that if your honorable committee has a grievance it is against me and not against him.

"What I told him was about as follows:

"I said that your expedition to this town was not an investigation conducted in good faith, but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

"I said that your whole proceeding here was irregular and extraordinary; that I had never heard of such conduct of an impeachment proceeding; that charges of this sort were not usually heard in public until the House of Representatives had considered them and were willing to stand back of them.

"I pointed out to him that you, contrary to the usual practice, had come here and had held public hearings; that among your witnesses you had invited every rogue that you could lay your hands on to come before you and blackguard and slander me and my assistants under the full privilege of testifying before a congressional committee.

"I told him that you had called one of my junior assistants before you and had attempted to make it publicly appear that his refusal to answer your questions as to what occurred in the grand jury room in the Buchanan case was due solely to my orders. I said that at the time you attempted to convey this public impression you knew that it was misleading because I had been asked by you to produce the minutes of the grand jury and had been instructed by the Attorney General not to comply with your request, as you well knew. I showed him the telegram of the Attorney General to me and showed him a copy of my letter to you, dated February twenty-ninth, nineteen hundred and sixteen, in which I sent you a copy of the tele-

gram of the Attorney General instructing me not to give you the grand jury minutes.

"I told him that you were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh, and David Slade, in constant conference with you. I said that I believed that every word of the evidence, whether in so-called secret sessions or not, had been placed at the disposal of these worthies, and that I would be just as willing to give the grand jury minutes to a defendant as to give them to your honorable subcommittee.

"I told him that I did not share the views which seemed to prevail in your subcommittee on this subject. I said that I regarded a Member of Congress who would take money for an unlawful purpose from any foreign agent as a traitor, and that it was a great pity that such a person could only be indicted under the Sherman Law, which carries only one year in jail as punishment.

"I said that it was incomprehensible to me how your honorable subcommittee should rush to the assistance of an indicted defendant; how you had apparently resolved to prevent prosecution by causing the district attorney in charge to be publicly slandered.

"I told him that I would not permit the prosecution of the persons whose cause you had apparently espoused to be impeded by you; I said that if you wanted the minutes of the grand jury in any case you would not get them as long as I remained in office.

"You will observe from the foregoing statement that what Mr. Holme published may have been based on what I said. If you have any quarrel, it is with me, and not with him.

"It is amazing to me to think that you supposed that I did not understand what you have been attempting to do during your visit here. I realized that your effort was to ruin me and my office by publishing with your full approval the complaints of various persons who have run afoul of the criminal law under my administration. Your subcommittee has endeavored by insulting questions to my assistants and others, by giving publicity and countenance to the charges of rascals and by refusing to listen to the truth and refusing to examine public records to which your attention was directed, to publicly disgrace me and my office.

"I propose to make this letter public.

"Respectfully,

"H. SNOWDEN MARSHALL,
"United States Attorney.

"Hon. C. C. CARLIN,
"Chairman Subcommittee of the Judiciary
"Committee of the House of Representatives,
"323 Federal Building, New York, N. Y."

That the said H. Snowden Marshall, in writing and publishing said letter, was guilty of a breach of the privileges and a contempt of the House of Representatives, and that the said H. Snowden Marshall be furnished with a copy of this resolution, and a copy of the report of the select committee of the House of Representatives, appointed to investigate the charges made against him in the House of Representatives.

RESOLVED FURTHER, That when H. Snowden Marshall shall be brought to the bar of the

House, to answer the charge of having violated the privileges of the House of Representatives, as afore set out, the Speaker shall then cause to be read to said H. Snowden Marshall the findings of fact and findings of law by the special committee of the House, charged with the duty of investigating whether or not the said H. Snowden Marshall had violated the privileges of the House of Representatives, or was in contempt of same; the Speaker shall then inquire of said H. Snowden Marshall if he desires to be heard, and to have counsel on the charge of being in contempt of the House of Representatives for having violated its privileges. If the said H. Snowden Marshall desires to avail himself of either of these privileges, the same shall be granted him. If not, the House shall thereupon proceed to take order in the matter.

Attest:
SOUTH TRIMBLE,
Clerk.

Now, therefore, this is to require you, Robert B. Gordon, Sergeant at Arms of the House of Representatives of the United States, forthwith to take into your custody the body of the said H. Snowden Marshall, of the State of New York, and to bring him before the bar of the House of Representatives of the United States to answer the charge of having violated the privileges of the House of Representatives as set out in the aforesaid resolution, and all marshals and deputy marshals, civil officers of the United States, and every other person are hereby required to aid and assist you, for which this shall be your sufficient warrant.

You are hereby required to furnish, and leave

with the said H. Snowden Marshall a copy of said resolution of the House of Representatives adopted June 20, 1916, and also a copy of House Report No. 544 of the select committee of the House of Representatives appointed to investigate the charges made against him in the House of Representatives and filed in said House of Representatives on the 14th day of April, 1916.

Hereof fail not, and make return in what manner you execute this writ.

(Sd.) CHAMP CLARK,
Speaker of the House of Representatives.

In testimony of the authority of this warrant witness the seal of the House of Representatives of the United States this 22nd day of June, 1916.

Attest:
(Sd). SOUTH TRIMBLE,
Clerk of the House of Representatives.

Office Supreme Court, U. S.
FILED
OCT 9 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1916.

No. 606.

H. SNOWDEN MARSHALL,
Appellant,

AGAINST

ROBERT B. GORDON, Sergeant-at-arms of the House of Representatives of the United States,
Appellee.

Concurrence in Motion to Advance.

The appellant, H. Snowden Marshall, joins in the motion of the appellee to advance.

The case is one in which the United States, through the House of Representatives of the Congress, are concerned; and it involves a matter of general public interest. The special and peculiar circumstances of the case justify its advancement.

It is agreed by appellant and appellee that any power of Congress in the matter will cease on the 4th of March, 1917, upon the expiration of the next session of the present Con-

gress. If this case is not decided before that time, the question will probably be a moot one.

The case is of even greater importance to the public than to Congress.

If under the circumstances disclosed an officer of the United States, or any citizen thereof may be tried and punished by Congress as for a contempt of its dignity, there are many newspaper publishers as well as private individuals who are amenable to similar punishment. Much of the usual criticism of Congress will come within any ruling sustaining the power of Congress in the present case. The people should know at an early day whether they are subject to be tried by the very body which they have criticized, or by the courts of law in the usual way.

This case, therefore, should be advanced.

JOHN C. SPOONER,
CHARLES P. SPOONER,
JESSE C. ADKINS,
Attorneys for Appellant.

October, 1916.

No. 606.

FILED
NOV 29 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1916.

H. SNOWDEN MARSHALL,

Appellant,

vs.

ROBERT B. GORDON, SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 606.

H. SNOWDEN MARSHALL,
Appellant,

vs.

ROBERT B. GORDON, Sergeant-at-Arms of the House of Representatives of the United States.

BRIEF FOR THE APPELLANT.

Question.

This case involves the right of the House of Representatives to punish any breach of its privileges as a criminal offense against the House. The particular breach here prosecuted is criticism of the conduct of three of its members, composing a sub-committee of the Committee on Judiciary.

The Facts.

Appellant is United States Attorney for the Southern District of New York.

The grand jury in the Southern District of New York, impaneled in September, 1915, was continued from term to term until December, and toward the end of December, handed down an indictment charging Frank Buchanan and others with violating the Sherman anti-trust law. Mr. Buchanan was then a member of the House of Representatives of the United States, and had been president of the Labors National Peace Council. The grand jury summoned a large number of witnesses for the early part of December, and the fact that an investigation was being made into the activities of the Labors National Peace Council became public property (R. Gard., 49 to 51, 53; Marshall. 94, 95).

Thereafter on December 14, 1915, Mr. Buchanan arose on the floor of the House, and "by virtue of the power conferred on" him "by the Constitution of the United States as a member of this House", impeached appellant on various charges. Among the charges specified was that appellant had used the powers of his office for the purpose of publicly defaming, slandering and libelling law abiding citizens of the United States. On Buchanan's motion the charges of impeachment were referred to the Judiciary Committee (Cong. Rec. 259; Rec. 9).

There the matter rested in the hands of Congress

until January 12, 1916. Any prosecuting officer might well have regarded this "impeachment" as an intimation to him to proceed safely; as a suggestion that its prosecution depended on his own conduct, as a palpable threat of trouble if Buchanan were indicted. Any district attorney, however innocent, might have been tempted to interfere with the grand jury, instead of leaving to them the question of presentment upon the evidence. This is the only known instance in the history of the country where a prosecuting attorney has been threatened with impeachment by an individual whose conduct was then under inquiry by a grand jury.

On December 28, 1915, the grand jury indicted Mr. Buchanan. He appeared and pleaded not guilty on January 5, 1916 (R. 1, 95).

On January 11, 1916, Mr. Buchanan again moved appellant's impeachment, and introduced a resolution directing the Judiciary Committee to inquire into the matter, but this Resolution was withdrawn (R. 95).

January 12, 1916, Buchanan renewed his impeachment on the floor of the House, and a resolution presented by him authorizing the Judiciary Committee to investigate his charges was adopted after debate, and the usual power was given to take testimony (R. 2, 13). January 27th another resolution authorized the appointment of a sub-committee with the same powers as the full committee (R. 2, 14). On February 1, 1916, a sub-committee of three members was appointed (R. 2, 15).

The sub-committee heard testimony both in Washington and in New York. Among the witnesses were many persons who had been indicted by the federal grand jury and some of whom had been convicted. While sitting in Washington the witnesses were heard in executive sessions, and at least one who had been convicted and was eager to testify, instead of being permitted to testify orally, was required to put his statements in affidavit form and to file the same with the committee (R. 2, 60, 61, 63, 64).

The appellant's recollection was that he was not invited to be present at the inquiry or given the right to cross-examine (R. 98). Mr. Nelson testified that only in their sessions in New York appellant was told that he had the right to be present either personally or by proxy (R. 67).

Some time in February the sub-committee came to New York, and heard witnesses from February 28th to March 4th. They held sessions in the Federal Building in New York, the same building in which were appellant's offices and a number of the Courts (R. 99).

The testimony taken in New York was all heard in public (R. 2). Many of the witnesses were under indictment, or had run afoul of the criminal law. Naturally they had no love for appellant, and did not hesitate to make all manner of charges against him. These statements were of course published at large in the newspapers.

It was an *ex parte* investigation conducted in public.

Among other things, counsel for Mr. Buchanan (R. 99, 65), and other counsel, one of whom was himself under indictment, were in constant attendance upon the open sessions of the Committee, and were permitted to conduct or participate in the examination of witnesses (R. Webb, 65; Gard, 82, 84; Marshall, 102).

Clearly, the course of the Committee could have no good effect upon the standing of appellant's office in the community or upon the morale of his office force. And on these things his usefulness in large part depended.

On March 3, 1916, the *New York Times* published an article in which was contained the statement, "It is the belief in the District Attorney's office that the real aim of the Congressional investigation is to put a stop to the criminal investigation of the pro-German partisans". On the same day, one Holme, a reporter for the *Times*, was called to the stand by the sub-committee. He admitted that he wrote the passage; he declined to give the name of any of his informants, although repeatedly pressed to do so. Thereupon the sub-committee ordered the sergeant-at-arms to hold him until further orders. The sergeant-at-arms tried to turn him over to the United States Marshal, who declined to receive him unless a warrant was presented with him. Thereupon the Marshal was called before the committee, the conversation which ensued being conducted in a low tone of voice, so that it was personal between the committee and Marshal. He was asked what were his reasons for refusing to put

the reporter under arrest. To this he replied that he had no authority so to do as no proper commitment of any kind had been filed in his office authorizing him to make an arrest, and adding that in his judgment the committee had no right to place him in the custody of the sergeant-at-arms. The Marshal was then requested to bring the authority upon which he relied. He then prepared a written statement referring to Section 102 of the Revised Statutes which he delivered to the sub-committee and at their request also brought to them a copy of the Revised Statutes and Volume 103, U. S. Reports. Thereafter the reporter was again brought to the witness chair, and informed that the committee did not wish to place him in an embarrassing position by continuing his state of arrest and would allow him his freedom till the committee desired to act further in the premises (see pp. 28, 80, 81 of the Report, R. 2, 3, 56, 80 and 81).

The reporter obviously was kept in custody and restrained of his liberty for an hour or two.

Undoubtedly a witness who is being examined by a committee of the House, investigating a matter within its jurisdiction, as a charge tending to impeachment certainly is, has no right to refuse to answer a proper question. It is submitted, however, that the question put to the witness Holme was not germane to the subject of investigation, but even if it were it is further submitted that whatever may be the power of the committee or sub-committee to enforce the attendance of the witness, neither of them has any authority to pun-

ish him by imprisonment for refusing to answer a question; that method of coercion can be pursued only by the House itself. Indeed this seems to be the opinion of at least one member of the Select Committee appointed in this matter by the House, who at page 90 of the Report (R. 118) states that he thinks the sub-committee exceeded their jurisdiction when they took the witness into custody; that they had not any right to take him into custody at all, and that if he refused to answer when they asked him material questions, they should have referred the matter to the House of Representatives.

When on the next day, appellant learned of the committee's conduct with reference to Holme, he wrote the Chairman of the Committee the letter which is the basis of this proceeding. He told the committee just what he had said to Holme.

This letter he sent to the Chairman of the Sub-committee at the latter's hotel in New York, after the sub-committee had finished its inquiry in New York, and had adjourned to meet again in Washington (R. 56, 133). As soon as the letter had been delivered to the Chairman appellant gave copies to the newspapers (R. 3). The newspapers were of course circulated throughout the country (R. 15). The letter appears in numerous places in the record (R. 25, 32, 40).

The Sub-committee reported the matter to the Judiciary Committee. On April 5, 1916, the Committee reported the circumstances to the House, with a

recommendation that a select committee of five be appointed to report upon the facts in this case; "the violations, if any, of the privileges of the House or the Committee on the Judiciary or the Sub-committee thereof; the power of the House to punish for contempt; and the procedure in contempt proceedings, to the end that the privileges of the House shall be maintained; and the rights of the members protected in the performance of their official duties" (R. 22).

The resolution was adopted. The select committee was appointed, and it proceeded to hear statements made by various members of the Judiciary Committee (R. 49 to 92).

Thereafter the Select Committee invited appellant to attend and make any statement he desired. He came before the Committee, and was then permitted to read the statements already made, after which his own statement was received (R. 92).

June 20, 1916, the Select Committee submitted a resolution which was agreed to after lengthy debate. It provides:

That the Speaker do issue his warrant to the Sergeant-at-Arms to take appellant in custody and forthwith bring him to the bar of the House to answer the charge that on March 4, 1916, *in the City of New York, he did violate the privileges of the House by writing and causing to be published the letter* (which is set forth).

That appellant in writing and publishing said letter

was guilty of a breach of the privileges and a contempt of the House of Representatives.

That when appellant shall be brought to the bar of the House to answer *the charge of having violated the privileges of the House*, as afore set out, the Speaker shall cause to be read to him the findings of fact and of law by the Special Committee charged with the duty of investigating whether appellant *had violated the privileges of the House* or was in contempt of the same; the Speaker shall inquire of appellant whether he desires to be heard and to have counsel on the charge of being in contempt of the House *for having violated its privileges.*

If appellant desires to avail himself of either of these privileges the same shall be granted to him. If not, the House shall thereupon proceed to take order in the matter (R. 5).

The warrant, after reciting the resolution, commands appellee to take appellant, and to bring him before the bar of the House of Representatives " to answer the charge of having violated the privileges of the House of Representatives as set out in the aforesaid resolution " (R. 8).

The warrant and resolution are stated so fully for the purpose of showing that the offense of which appellant has been convicted is *violating the privileges of the House by criticising the conduct of its members.* The use of the word *contempt* is merely incidental. *Breach of privilege* is the offence. It is specifically charged *that the breach occurred in New York City*, and that *it con-*

sisted of writing and publishing a criticism of the members.

The resolution regards as immaterial the presence of any of the members in New York at the time, or that the letter was delivered to one of them, or the character of this inquiry. The power sought by the House inevitably leads to the broad proposition that it is a breach of privilege to publish anywhere in the United States any criticism of any act of any member of the House.

Note also that, without anything approaching what would be regarded as a trial in a court, the House has already determined that appellant is guilty of having violated their privileges. And while they grant to him as a matter of grace, not of right, the privilege of being heard in person or by counsel, the privilege thus graciously conferred is merely that of craving mercy. It is to be compared, not to the Constitutional right of a person charged with crime, to be confronted by the witnesses, and to have his guilt proved beyond a reasonable doubt, but to that of a person convicted of crime to say why sentence should not be imposed on him.

June 26, 1916, appellee arrested appellant at the latter's office. Appellant then applied for and secured a writ of *habeas corpus*. The case was heard upon amended return before Judge Learned Hand, who, on July 21, 1916, discharged the writ and remanded appellant to the custody of appellee (R. 148).

This appeal was duly prosecuted.

Assignment of Errors.

The assignment of errors is as follows (149):

The Court erred:

(1) In discharging the said writ of *habeas corpus* and remanding the petitioner to custody;

(2) In holding that the petitioner's restraint and detention under the warrant mentioned in the petition was not without authority under the Constitution and laws of the United States;

(3) In holding that the petitioner was not deprived of his liberty under the said warrant in violation of his rights, privileges and immunities under the Constitution and laws of the United States;

(4) In holding that the said Robert B. Gordon, Sergeant-at-Arms of the House of Representatives of the United States under the Constitution and laws of the United States had authority under and by virtue of the order or warrant signed by the Speaker of the House of Representatives of the United States and mentioned in the petition, to take the petitioner in custody and bring him to the bar of said House to answer the charge that petitioner, on March 4th, 1916, in the City of New York, did write and publish a certain letter and did thereby violate the privileges of the House of Representatives and commit a contempt of the House of Representatives;

(5) In refusing to hold that the House of Representatives was without lawful authority under the Constitution and laws of the United States to issue said warrant or order and to execute the same against the petitioner;

(6) In holding that the writing and publishing of said letter constituted an act of which the House of Representatives under the Constitution and laws of the United States and jurisdiction to try or punish the petitioner;

(7) In holding that the resolution of the House of Representatives of June 20th, 1916, pursuant to which said warrant was issued, was authority in law and under the Constitution of the United States for the issuance of said warrant and the arrest of the petitioner thereunder;

(8) In not holding that the House of Representatives was under the Constitution and laws of the United States without jurisdiction to try or punish petitioner for the writing and publishing of said letter as charged in said resolution of June 20th, 1916.

Outline of Argument.

The case involves the Constitutional right of either House of Congress to judge of its privileges, and to summarily inflict criminal punishment upon any citizen whom it deems guilty of a breach of its privileges.

The argument will be discussed under the following heads:

I. The House of Representatives of the United States has no general power to punish any act as a crime. No such power is expressly given to it by the Constitution.

II. Such power is not impliedly conferred upon Congress or either House thereof.

A. The House of Representatives has not the same powers as the House of Commons.

B. The power to punish a breach of its privileges or any other act as a criminal offence is not necessary to enable the House of Representatives to perform its duties or exercise the powers expressly conferred on it by the Constitution.

1. Decisions of this Court.
2. The English cases.
3. The administrative tribunals.
4. Not all courts have the power asserted by Congress.
5. Congress may by law provide additional safeguards.

III. The fact that the House of Representatives was investigating a charge that a civil officer should be impeached, does not alter the rule, or confer any greater power upon the House.

A. There is no reason for such greater power. The distinction would be difficult of application.

B. The House of Representatives when sitting in impeachment proceedings is not a court, and has no power to punish criminal contempt by analogy to courts.

1. The proceeding is in the nature of a criminal prosecution for a past act, not a coercive measure to compel obedience.

2. House of Representatives is not a court and in no way similar to a court of record.

   (*a*) Nature of impeachment proceedings.

   (*b*) House of Representatives is analogous to neither a court nor a grand jury.

   (*c*) The functions of the House are analogous to those of a prosecuting attorney.

3. Not every court has the power to punish for contempt out of its presence.

4. It is doubtful if the district courts of United States would have the power to punish for the appellant's act.

ARGUMENT.

I.

The House of Representatives of the United States has no general power to punish any act as a crime. No such power is expressly given to it by the Constitution.

The attempt of the House in this case is to punish appellant for a breach of its privileges. True, he is charged with being in *contempt* of the House, but that is only because he had breached its privileges.

There is much confusion of thought and language in discussions of contempt. The two Gompers cases in this Court greatly clarify the subject (221 U. S. pp. 418, 41) (233 U. S. pp. 604, 610). Contempt has both a civil and a criminal aspect; a civil contempt proceeding is merely process to compel actions or a determination of damages in recompense of a wrongful act. In many instances a contempt is a crime. It was originally punished by indictment or information in the same manner as all other crimes, and even now, when the proceeding is summary, the defendant is entitled to all the constitutional safeguards except trial by jury.

While we attempt throughout the brief to make plain the sense in which the word contempt is used, we state now that wherever we admit the right of the House to punish for contempt, we mean by civil pro-

cess only, and we think the decisions can logically be supported only on this theory.

There is no such difficulty with the expression breach of privileges. The privileges of the House of Congress are set forth in the Constitution and members have no other privileges (Art. I, Sec. 6). The provision is in substance the same as that contained in the Articles of Confederation (Art. V). There is no power granted to either House to itself punish a breach of privilege. The enforcement of the privilege is left to the courts. Congress can easily make criminal a breach of its privileges, if that be desired.

As to punishment by a House itself, that extends only to members (Art I, Sec. 5).

There may be many acts of rudeness or disobedience to either House which do not violate its privileges. One spectator may assault another in the galleries; a witness may decline to testify. In either case the House may act promptly, in the one by ejecting the disturbers, and in the other by coercing the witness by confinement. This is not punishment in the legal sense.

In fact neither House has any power over *contempts* as that word is used in the criminal sense. It is not properly applicable to power over members. They are punishable for disorderly conduct or breach of the rules, and for no other offense.

For an interesting discussion of the difference between breach of privilege and contempt, see the minority report of Mr. Justice Barbour, then a member of

the House, in the case of Russell Jarvis, charged with contempt of the House in assaulting the messenger of the President in the Capitol rotunda (20th Cong. 1st Sess. House Rep. No. 260, May 16, 1828, p. 4).

That the House of Representatives has no general power to punish any act as a crime, and that no such power is expressly given to it by the Constitution, is settled by this Court. The reasons upon which it is based and the conclusion itself, are thus stated by Mr. Justice Miller in *Kilbourn* v. *Thompson*, 103 U. S. 168 at 182:

> "The powers of Congress itself, when acting through the concurrence of both branches, are dependent solely on the Constitution. Such as are not conferred by that instrument, either expressly or by fair implication from what is granted, are 'reserved to the States respectively or to the people'. Of course, neither branch of Congress when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body, except in the few instances where authority is conferred on either House separately, as in the case of impeachments. No general power of inflicting punishment by the Congress of the United States is found in that instrument. It contains in the provision that 'no person shall be deprived of life, liberty or property without due process of law', the strongest implication against punishment by order of the legislative body. It has been repeatedly decided by this Court, and by others of the highest authority, that this means a trial in which the

rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established. An act of Congress which proposed to adjudge a man guilty of a crime and inflict the punishment, would be conceded by all thinking men to be unauthorized by anything in the constitution. That instrument, however, is not wholly silent as to the authority of the separate branches of Congress to inflict punishment. It authorizes each House to punish its own members. By the second clause of the fifth section of the first article 'Each House may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member', and by the clause immediately preceding it, 'may be authorized to compel the attendence of absent members, in such manner and under such penalties as each House may provide'. These provisions are equally instructive in what they authorize and in what they do not authorize. There is no express power in that instrument conferred on either House of Congress to punish for contempts."

While it seems a work of supererogation to say more on this subject, it is permissible perhaps to restate the argument.

The Continental Congress had had no way to enforce its laws; it had wandered from city to city, had been lampooned in the press, and insulted and threatened by the continental soldiers. It had appealed in

vain for protection at the hands of the authorities in the places where it had sat. Its impotence was shown in the most striking way by an incident in June, 1783, when eighty soldiers under their sergeants marched on Philadelphia for the purpose of obtaining their pay. They assumed a position before the State House where Congress was assembled, and remained throughout the day, occasionally uttering offensive words and pointing their muskets at the windows of the halls of Congress. Congress adjourned at the usual hour, the soldiers permitting the members to pass through their ranks, though in some instances offering a mock obstruction. That evening the reports from the soldiers

> " were in constant vibration. At one moment the mutineers were penitent and preparing submission; the next, they were meditating more violent measures. Sometimes the bank was their object; then the seizure of the members of Congress, with whom they imagined an indemnity for their offence might be stipulated."

The local authorities being unable or unwilling to assure protection, Congress adjourned to Trenton (5 Elliott's Debates, 2d Ed. 92–94; 1 Curtis Const. Hist. 149; 1 McMaster Hist. 183).

McMaster (p. 133, Vol. 1) thus describes the migrations of Congress:

> " To the scoffers and malcontents of that day, nothing was more diverting than the uncertain wanderings of Congress. Driven from Philadelphia by the jibes and taunts of a band

> of drunken ploughmen, it flees to Princeton, and there, under the guns of 1,500 regulars, passes its resolutions in Nassau Hall. From Princeton it adjourns to Annapolis, from Annapolis to Trenton, and from Trenton to New York. Meanwhile the press is making merry. In one squib Congress is likened to a pendulum vibrating between Annapolis and New York. In another an honest countryman is made to entreat the Lord to make it like unto a wheel, and keep it rolling from Dan to Beersheba, from Beersheba to Dan, and give it no rest this side of Jordan.
>
> In the coffee-houses and taverns no toasts were drunk with such uproarious applause as 'A hoop to the barrel' and 'Cement to the Union.'"

The members of the Federal Convention, of course, must have had a vivid recollection of the insults and indignities suffered by the Continental Congress, and it is to be expected that we shall find in the instrument as they frame it a grant of all the powers which they consider needful to the protection of the new Congress.

On the other hand, we must remember the jealousy felt by many of the people of the States against the establishment of such a government as the one proposed, without express safeguards to protect the rights of States and of individuals. This jealously resulted in the adoption of the Ten amendments, and is shown in the preamble to the resolution by which the First Congress proposed the amendments to the state legislatures, which recites that "the conventions of a number

of the States had, at the time of ratifying the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers that further declarative and restrictive clauses should be added". Curtis Constitutional History of United States, 153, 4, 9.

Therefore we approach an examination of the Constitution itself with the confident expectation that we shall find in that instrument what the framers considered adequate provision for the protection of Congress, and that such provision shall be clearly and unmistakably set forth, but shall not be such as to infringe on the liberties of the States or of the people. And if there should be any apparent conflict between the powers granted in the Constitution, and the restrictions imposed in the amendments, or the provisions made therein for the safety and protection of the people, the latter are to control.

In vain do we search the Constitution for any provision authorizing each House to itself try and imprison a citizen for any offense.

Art. I, Sec. 5, provides that a smaller number than a quorum of each House

> " may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.
>
> Each House may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member."

These are the only provisions of the Constitution giving either House the power of inflicting punishment. Under them that punishment can be inflicted only on a member of the House, and then only for the violation of its rules or the disturbance of its proceedings. If a minority member, in the retirement of his own district, undertakes to criticize the actions of his brethren, there is no power to punish him, except by expulsion. Much less is there power to punish a non-member for the same act.

But there are other provisions of the Constitution which clearly safeguard the citizen from such attempts on the part of Congress.

Art. III, Sec. 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

This Court has said this means the *whole* judicial power shall be vested in the courts. *Martin* v. *Hunters' Lessee*, 1 Wheat. 304, 328.

Art. III, Sec. 2. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed.

Amendment V. Nor shall any person . . . be deprived of life, liberty or property without due process of law.

Amendment VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial, by an impartial jury of the State and district wherein the crime shall have been committed.

Libel is a crime. Contempts are spoken of as criminal and civil. Sometimes a fine is imposed for the benefit of the injured party, or the contemner is imprisoned until he obeys an order of the Court; in which event the proceeding is civil. But when the effort is to punish an individual for an act committed, the proceeding is criminal. The present attempt of Congress is of the latter class, and therefore a criminal proceeding.

Assuming that trial by jury in a contempt case is not necessary—though such was originally the law, and the trend of modern legislation is again in that direction—this proceeding is in essence an attempt by Congress to try and punish an offence alleged to have been committed in the City of New York. It is in clear violation of Art. III, Sec. 2 and of the Sixth Amendment.

Nor is it due process of law, and therefore violates the Fifth Amendment.

The expression due process of law as used in the Constitution, has been considered by this Court as not susceptible of a comprehensive definition including all states of fact to which its application might be necessary. The Court has for the most part contented itself with the application of, or the refusal to apply it, to individual states of fact, as they have been brought before it. It has, however, deemed it necessary and

wise, from time to time, to make general statements in regard to it.

For instance, it has been said that due process of law must be understood to mean law in the regular course of administration through courts of justice, according to those rules and forms which have been established for the protection of private rights. *Caldwell* v. *Texas*, 137 U. S. 691; *Leeper* v. *Texas*, 139 U. S. 462. The substance of the foregoing has been at other times stated by this Court, to the effect that it means law according to the settled course of judicial proceedings, or in accordance with fundamental principles of justice enforcible in the usual modes established in the administration of government, with respect to kindred matters. *Slaughter House Cases*, 16 Wallace, 36; *Pennoyer* v. *Neff*, 95 U. S. 714; *Dent* v. *West Virginia*, 129 U. S. 114.

It would be manifestly a waste of this Court's time to go into any detail in showing how the exercise of the power here contended for would do violence to due process of law. A comparison of the power sought with the foregoing general statements of this Court either establishes our position in this connection, or shows that it is untenable.

Adequate provision was made in other sections of the Constitution for the protection of Congress. Clause 17 of Section 8 of Article I, certainly in conjunction with the next clause, was ample for that purpose. See 1 Curtis Const. Hist. 487; Federalist No. 42; 2 Story Const., Sec. 1218.

Clause 17 gives Congress power—

> "To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding 10 miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States."

Under this provision, as well as under clause 18, giving power to make all laws which shall be necessary and proper for the carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof, Congress has full power to make all laws needful to protect it from insult and indignity, with the sole proviso that for violating those laws, an offender shall be tried by the courts in the usual way.

Such is the conclusion reached by Tucker in his Commentaries on the Constitution, Vol. 1, Sec. 205, p. 437.

The power asserted by Congress is contrary to the spirit of our institutions.

Punishment for crime is a judicial function; under our Constitution the judicial power is sharply separated from the legislative and executive, and each has its own independent sphere.

It is contrary to the spirit of our institutions to treat anything as a crime, unless it be defined and its punishment fixed beforehand; or to permit imprisonment to be imposed by any branch of the government

except the judiciary. A person charged with crime is to be tried by a court presided over by a judge learned in the law and unbiased as to facts and responsible to higher authority for failure to follow the usual methods of procedure—either by reversal or impeachment.

Any power conferred upon Congress in seeming violation of this rule is not so in fact.

Congress may keep order in its deliberations, and may admit or expel its members, but its action in reaching a conclusion is not the exercise of a judicial power, even though in so doing it follow judicial forms as near as may be. The same power is exercised by all bodies of men—municipal councils, corporations, churches, secret societies, clubs and even political parties (*Bradlaugh* v. *Gossett*, L. R. 12 Q. B. D. 271, 283).

The Senate has the power to ratify or confirm the appointment of civil officers of the government, and also, upon impeachment by the House that officers have been guilty of high crimes and misdemeanors, to remove them. Neither of these powers is judicial, though in exercising either the Senate may act upon sworn testimony and otherwise follow the forms of the courts.

True, in England, impeachment was a judicial proceeding in the real sense, but there it was a charge of crime and was tried by the highest court of the land, which inflicted any criminal penalty.

Here our Constitution has expressly separated the criminal jurisdiction, and has said that a civil officer can

be punished for a crime only as may any other person. But if such civil officer be unfit, by reason of misconduct, whether it be indictable or not, to hold his office, he may be removed from office by the Senate upon charges made by the House. But such power exercised by Congress is not judicial—it is merely political.

This proposition is amplified, and the authorities are cited in a very interesting article on the Impeachment of the Federal Judiciary by Wrisley Brown in the *Harvard Law Review* for June, 1913 (Vol. 26, p. 684).

It amounts to no more than the removal from office of a civil officer. In this case the President might have been asked to remove appellant from office. The President's inquiry into the facts and decision could not be called judicial.

When an officer under the civil service is called upon to show why he should not be removed for cause, the action of the executive is not judicial, though the executive may be restrained unless he follows the law.

So, in the recall of elective or appointive officers, the action of the electors is not judicial.

So that, in no instance is judicial power, in the Constitutional sense, conferred upon either branch of Congress. See Wilson's Lectures, 451.

Suppose that the Convention had inserted in the Constitution a provision in substance as follows:

> "The House of Representatives while engaged in proceedings looking to the impeachment of an officer shall have power by a majority

> vote to determine that any act or word of any person in or out of its presence is a contempt of the House of Representatives and a breach of its privileges; and the House of Representatives shall have power by vote to determine the punishment to be inflicted for such contempt, and such action by the House of Representatives shall not be reviewable by any court."

Is it conceivable that a constitution containing such a clause would have been adopted by a single one of the United States? And yet the decision below has read the provision into the Constitution, and Congress is now endeavoring to assert the power which it would convey.

II.

Such power is not impliedly conferred upon Congress.

The argument in support of this power by implication must rest (A) either on the ground that the House of Representatives has the same powers as the House of Commons, or (B) that the power is necessary to enable the House of Representatives to exercise the powers expressly conferred by the Constitution.

A. The House of Representatives has not the same powers as the House of Commons.

Generally speaking, Parliament had many powers which were not conferred on Congress. It was and is

supreme. Congress has only that power given to it by the Constitution, and our fundamental maxim of construction is diametrically opposed to the English one.

Under that maxim Congress has only those powers expressly granted or necessarily implied, so that upon analysis its implied powers rest upon necessity.

More specifically, the reason why Parliament had this power does not exist as to Congress. Parliament was a court, and had the same powers to punish for contempt as any other court. This proposition has already been decided by this court in *Kilbourn* v. *Thompson*, *supra*, and we cannot do better than to state the argument and conclusion in that case.

There this Court said:

> " That the power to punish for contempt has been exercised by the House of Commons in numerous instances is well known to the general student of history, and is authenticated by the rolls of the Parliament. And there is no question but that this has been upheld by the courts of Westminster Hall " (p. 183).
>
> " It is important, however, to understand on what principle this power in the House of Commons rests, that we may see whether it is applicable to the two Houses of Congress, and, if it be, whether there are limitations to its exercise.
>
> While there is, in the adjudged cases in the English courts, little agreement of opinion as to the extent of this power, and the liability of its

exercise to be inquired into by the courts, there is no difference of opinion as to its origin. This goes back to the period when the bishops, the lords, and the knights and burgesses met in one body, and were, when so assembled, called the High Court of Parliament.

They were not only called so, but the assembled Parliament exercised the highest functions of a court of judicature, representing in that respect the judicial authority of the king in his Court of Parliament. While this body enacted laws, it also rendered judgments in matters of private right, which, when approved by the king, were recognized as valid. Upon the separation of the Lords and Commons into two separate bodies, holding their sessions in different chambers, and hence called the House of Lords and the House of Commons, the judicial function of reviewing by appeal the decisions of the courts of Westminster Hall passed to the House of Lords, where it has been exercised without dispute ever since. To the Commons was left the power of impeachment, and, perhaps, others of a judicial character, and jointly they exercised, until a very recent period, the power of passing bills of attainder for treason and other high crimes which are in their nature punishment for crime declared judicially by the High Court of Parliament of the Kingdom of England.

It is upon this idea that the two Houses of Parliament were each courts of judicature originally, which, though divested by usage, and by statute, probably, of many of their judicial func-

tions, have yet retained so much of that power as enables them, like any other court, to punish for a contempt of these privileges and authority that the power rests" (pp. 183–184).

Again quoting from *Keilly* v. *Carson*, 4 Moore P. C. 63, the Court said:

> "The reason why the House of Commons has this power is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo parliamenti*, which forms a part of the common law of the land, and according to which the High Court of Parliament before its division and the Houses of Lords and Commons since, are invested with many privileges, that of punishment for contempt being one" (pp. 188–189).

The Court continued (p. 189):

> "*We have cited it* (Keilly *v.* Carson) *to show that the powers and privileges of the House of Commons of England, on the subject of punishment for contempts, rest on principles which have no application to other legislative bodies, and certainly can have none to the House of Representatives of the United States—a body which is in no sense a Court, which exercises no functions derived from its once having been a part of the highest court of the realm, and whose functions, so far as they partake in any degree of that character, are limited to punishing its own members and determining their election.*" (Italics ours.)

Upon this point the Court concluded (p. 189):

> "We are of opinion that the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two Houses of the English Parliamant, nor from the adjudged cases in which the English courts have upheld these practices."

B. The power to punish a breach of its privileges or any other act as a criminal offence is not necessary to enable the House of Representatives to perform its duties or exercise the powers expressly conferred on it by the Constitution.

The House is not content with the admission of the power to exclude those who disturb its deliberations, and to coerce the giving of testimony in proper cases, but asserts as necessary to its very existence, the power in itself summarily to inflict such punishment as it deems proper upon those who violate the privileges of the House or any of its members, or who even criticize the acts of one of its members in what the House may choose to regard as an improper or contemptuous way.

Their contention would necessarily mean that in a conflict between the judiciary and the House as to what was a breach of privilege or an insult to the House, the decision of the latter would be controlling. Thus there might be precipitated at any time a conflict similar to that disclosed in *Stockdale* v. *Hansard*, 9 Ad. & El. 1, and *Case of the Sheriff of Middlesex*, 11 Ad. & E. 273.

The attempt in 1871 of the New York Legislature to hold Justice Potter guilty of an offense against one of the branches of the Legislature in issuing an attachment to compel the attendance before the grand jury of a member of the body is the only case of the kind in this country which we have found. Potter's Dwarris on Statutes, 573. That such a contest should arise between Congress and the Federal judiciary is unthinkable at the present day, and yet it is possible under the broad claim now made by the House.

In other words, Congress now asserts on the ground of necessity the existence of practically the full power belonging to the House of Commons, though this Court has held that it has no such power by express grant or by analogy to that body.

The contention of Congress means that every citizen, whether office-holder or not, however humble or exalted he may be, may, at the will of an aggrieved House, be arrested and imprisoned, for any criticism of either House of Congress or any member thereof, which either body may regard as insulting or contemptuous. This will practically destroy the freedom of the press, and of public discussion.

In past times there has been most intemperate criticism of members of one House by those of the other, and even by the President and his cabinet. It is now asserted that all such speech is punishable by the House aggrieved.

It will not do to say that in such cases, Congress will not in its wise discretion exercise its power to

punish. In all such cases it is the duty of the House insulted, *if it has the power*, to inflict punishment, in order to protect itself, and maintain its rights. A contrary admission greatly weakens, if it does not altogether destroy, the argument of necessity upon which the existence of the power is based.

If this be the law, as Mr. Justice Barbour said, when a member of the House of Representatives, that body would have little time in which to legislate (Minority Report in Russell Jarvis case, Report 260, H. R. 20th Cong., 1st Session, May 16, 1828).

Upon this mere statement of the consequences, the mind shrinks from the conclusion that the full power asserted by Congress exists. On the other hand, there is force in the argument that Congress must have some power of self-help. We think the line of demarcation is logical and plain, and is easily ascertainable from the reported cases.

The principle of construction is similar to that set forth by this Court in discussing the implied powers of Congress to pass laws.

In *McCulloch* v. *Maryland*, 4 Wheaton 316, Chief Justice Marshall, in discussing the implied power to incorporate the Bank of the United States and the power, added to the enumerated powers, of making

> "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or any department thereof" said on page 421:
>
> "We admit, as all must admit, that the powers

of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.*" (Italics ours.)

The principle is not peculiar to Constitutions, but is applicable to all grants of powers. *Ex parte Yarbrough*, 110 U. S. 651, 658.

It is embodied in the maxim *Quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest* (5 Coke, 47). When the law gives a man anything, it gives him that also without which the thing itself cannot exist.

Congress is a deliberative body, passing laws upon careful consideration; it is supreme as to its internal government.

Therefore, it has the right to preserve peace and decorum in its deliberations, to compel attendance of its members, to admit them to membership and to expel them, and to punish them for disorder. We need not deny its power to imprison its members in the

execution of these duties, though we see no need for the punishment to go beyond compulsory attendance or expulsion.

So as to witnesses, we may admit the power to force a witness to attend Congress and to testify, and to coerce him by imprisoning him until he does attend and testify.

As to visitors to the halls of Congress, we may admit the power to keep order, to eject any one disturbing its deliberations, and to seize and hold him until he may be turned over to the proper authorities for trial and punishment if he has violated any law.

So, in the exercise of these powers, we may admit the right of Congress to pass laws making criminal disorderly conduct in their presence, refusal to attend or to testify, an assault upon a member for his action in the House, or a libel upon a member for such action, or an attempt to bribe a member.

This is in substance what Congress has done, either by express statute, or by reliance upon the local laws.

It is impossible to say that the efficiency and dignity of Congress have not been or cannot be amply protected under the present laws. But if anything be lacking, there is still a vast reservoir of power in Congress to make provision therefor by law (Clause 18, Sec. 8, Art. I).

In short, then, our proposition is that while each House of Congress may have all power by removal from its halls, and by coercive imprisonment necessary to enable it to perform its Constitutional duties, it is

absolutely without power to itself impose punishment for a past act, which it may regard as contemptuous or a breach of its privileges. For such offences punishment must be inflicted by the courts, as for other crimes, and under the safeguard of all constitutional provisions.

(1) *Decisions of this Court.*

Anderson v. *Dunn*, 6 Wheat. 204, and *Kilbourn* v. *Thompson*, 103 U. S. 168, are the important cases upon the subject. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, and *In re Chapman*, 166 U. S. 661, are helpful.

Anderson v. *Dunn*, decided in 1821, held that a judgment of the House that a man had been guilty of contempt was conclusive on the courts, because the House had the same broad powers with respect to contempt as had a court. Until 1880 this was accepted by the textwriters and state courts as authoritative, and is responsible for whatever statements may be found therein favorable to the contention of the House. While the case was cited to the Privy Council in argument of *Kielley* v. *Carson*, 4 Moore P. C. 63, the English Court declined to follow it.

In 1880, *Kilbourn* v. *Thompson* overruled *Anderson* v. *Dunn*, and held that the courts could always inquire into the jurisdiction of either House to commit; the power was placed expressly on the ground that the House had no general power to commit for contempt, but had only a most limited and special power

in that respect. Aside from the power to punish its own members expressly given by the Constitution, it is perfectly apparent that the court was talking only of the coercive power to compel testimony by imprisonment, and that it had in mind process merely, or civil proceedings for contempt as distinguished from a punishment for a criminal act.

In one important respect the two opinions are similar. At the outset both announce that there is no express power given by the Constitution to either House to punish for contempt, except when committed by their own members; that such a power, if it exists, must be derived by implication, and that the genius and spirit of our institutions are hostile to the exercise of implied powers.

Here the opinions diverge. In the first case, Mr. Justice Johnson, who had himself spent several years in the South Carolina Legislature, argues that the power is absolutely necessary to the existence of Congress, and upon this argument, and partly by analogy to other legislative bodies and courts, finally holds the warrant and judgment of the House to be conclusive on the Courts because of the existence of this enormous power to punish. In answering the objection that Congress might pusl its power to the infliction of corporal punishment or even death, *and exercise it in cases affecting the liberty of speech and of the press*, he said the Constitution was formed in and for an advanced state of society, and such fears were therefore groundless.

His arguments on necessity were not essential to

the case, for upon the pleadings, which did not disclose any of the facts, he held that the contempt might have happened in the face of the House, in which event he said Anderson admitted the power of the House to punish.

Kilbourn v. *Thompson* in our judgment wholly and necessarily overrules the points of decision of *Anderson* v. *Dunn*. In addition, Mr. Justice Miller, while expressly not ruling on the necessity point, answers Mr. Justice Johnson's arguments, and clearly indicates a contrary view.

Anderson v. *Dunn* is predicated upon the following facts:

Anderson sued for assault and false imprisonment, and Dunn pleaded in bar that his acts were committed, as Sergeant-at-Arms of the House, to which Anderson demurred. The plea recites that on January 7, 1818, the House resolved and ordered that Anderson had been guilty of a breach of the privileges and of a high contempt of the House, and that in pursuance of a warrant then issued he took Anderson in custody to answer that charge, and had Anderson before the House from day to day thereafter, and Anderson was duly examined and heard in defence, until January 16, 1818, when the House resolved and adjudged that Anderson was guilty and convicted of the charge, and Anderson was first reprimanded by the Speaker for the outrage committed, and then discharged.

This is all that is shown by the record as to the facts. It is true from a suggestion in the argument

(p. 215) it may be inferred that the offence was an offer of money to a member of the House, but the decision itself is based on the proposition that the offence may have been committed in the immediate presence of the House (229), though, of course, the court clearly thought the power much broader.

The argument for the House was based on analogy to the House of Commons, and the same necessity for the power as existed in the Courts, *Burdett* v. *Abbott* 14 East, 1, being largely quoted.

Justice Johnson stated the proposition to be a narrow one. "Whether the House of Representatives can take cognizance of contempts committed against themselves *under any circumstances?*" (224). (Italics ours.) Later he says counsel admit this power when the contempt is committed in the immediate presence of the House, and this is enough to dispose of the case under the pleadings (229).

The Court then holds the judgment of the House conclusive on it, saying they are not to presume that the House would have issued the warrant without duly establishing the fact charged on the individual (234).

These are the real matters decided, but in view of the argument made for the exercise of the general power to punish, which the Court evidently thought to exist, we may point out what we consider the errors in the Court's reasoning.

After announcing that if the power exists it must be by implication, and the genius and spirit of our in-

stitutions are hostile to the exercise of implied powers (225), the Justice says there is one maxim which necessarily overrides all others, that public functionaries must be left at liberty to exercise the powers which the people have entrusted to them; nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers. He says the laws are equally for the benefit of the wretch on the gallows, and speaks of "the unreasonable murmurs of individuals against the restraints of society" (226–7).

We have always understood that even public functionaries must keep strictly within the law in the exercise of their powers, and that many of the provisions of the Constitution were for the express purpose of protecting the people from those functionaries in the exercise of their delegated power; that a conflict with the rights of particular individuals was never *casual*, but always called for the exercise of keenest judgment at the hands of the courts to protect not only the particular individuals, but all others who might be similarly situated. Even the meanest wretch is brought to the gallows, not by order of the House of Representatives, but by the judgment of an impartial court. The murmurs of individuals against their public functionaries cannot harm the latter unless unreasonable, and the question of reasonableness is to be determined, not by the indignant functionaries themselves but again by an impartial Court.

The Court says that the denial of the power "leads

to the total annihilation of the power of Congress to guard itself from contempts, and leaves it exposed to every indignity that rudeness, caprice, or even conspiracy may meditate against it". And the Justice argues that the power of exclusion is not enough (228–229) and that the power of legislation over the District of Columbia was intended for purposes of a more grave and general character than the offences which may be denominated contempts, saying that judicial gravity will not admit of illustrations (230).

The argument is inconsistent. The power is so essential that without it Congress may be annihilated; yet the contempts which may result so disastrously may be by acts so trifling and insignificant that dignity and gravity will not permit their definition or enumeration.

In later years Congress has made provision for the punishment of offenses occurring in the Capitol and grounds, and is protected by an efficient police. We have already shown that the gift of exclusive control over the federal district was for self protection; and we shall show hereafter that the provisions made by Congress by law are ample for its protection, not only from rudeness, caprice or conspiracy, but from all offenses which may be conceived by even the most exuberant imagination.

The Court says that the concession of the power to punish contempts committed within the walls of Congress, relinquishes the great grounds of the argument, to wit, the want of an express power. And it is ar-

gued that there is as much reason for the exercise of the power without their walls as within them.

While we think the two cases are by no means similar, and that there can be no need for the punishment by Congress itself of a criticism of it made in New York. Notwithstanding the statement of the Court, we have failed to find in the argument of Anderson's counsel an admission of *any* power to punish for contempt. From his constitutional argument, it is apparent that he insisted that only the courts had power to inflict punishment for a past act—omitting now all reference to power over members themselves. Any concession that he made must have been as to civil contempt, or as to coercion; and such concession we do not hesitate to make.

To the argument that the express grant of power to punish their members, respectively, by the exercise of a familiar maxim, raises an implication against the power to punish any other than their own members, the Justice says this proves too much; for its application would lead to the annihilation of almost every power of Congress. He says that all the punishing powers exercised by Congress, except those which relate to piracy, and the law of nations is derived by implication (232–3).

Evidently he refers to Art. I, Sec. 8, Clause 10, which gives Congress power "*to define and punish* piracies", etc. Clause 6 reads "*to provide for* the punishing of counterfeiting", while other crimes are created by law as necessary to execute the powers expressly

granted. It would be absurd to say that *Congress* is to try and convict pirates, and the Sergeants-at-Arms are to hang them. Notwithstanding the difference in phraseology, the trial of pirates is to be by the courts.

Clause 18, under which most of the criminal statutes are passed, confers no power upon either House to punish an offence; it merely clothes the entire Congress with power to make laws creating crimes.

Kilbourn v. *Thompson*, 103 U. S. 168, was as follows: Kilbourn sued Thompson for false imprisonment by the latter as Sergeant-at-Arms of the House, pursuant to a resolution of the House of Representatives adjudging him guilty of contempt in refusing to answer certain questions propounded by a House Committee, and committing Kilbourn until he made answer. Thompson's plea disclosed the facts, and the case was heard on demurrer thereto.

Kilbourn was a member of a "real estate pool" engaged in operations in the District of Columbia, in which it was supposed that Jay Cooke had an interest; the United States was a creditor of the firm of Jay Cooke & Co.; that firm was in bankruptcy; the trustee in bankruptcy made a settlement of the interest of the estate of Jay Cooke with his associates in said firm; this settlement was unsatisfactory to the creditors, who, it was said, were without relief in the courts. Thereupon a resolution of the House, after reciting these facts, provided for a special committee to inquire into the matter and history of said pool and the character

of the settlement. When called before this Committee Kilbourn refused to name the members of the pool, or to disclose its affairs, and was ordered imprisoned until he made answer to the Committee's questions.

While still in prison and refusing to answer, the matter was referred to the district attorney, and Kilbourn was indicted in the Supreme Court of the District of Columbia under Sections 102 and 104 of the Revised Statutes of the United States.

Notwithstanding the indictment, the Sergeant-at-Arms refused to surrender Kilbourn, where upon the latter sued out a writ of *habeas corpus* before Chief Justice Carter of the Supreme Court of the District. The latter held that the offence against the House and that prescribed in the indictment were the same, and that the punishment prescribed in the statute was intended as the punishment for the crime. Accordingly he ordered Kilbourn turned over to the marshal for trial, 3 Wash. Law Rep. 83.

Meanwhile the damage suit reached this Court on demurrer. In an elaborate and well considered opinion, written by Mr. Justice Miller, and before partially quoted, this Court held, as already shown, that the Constitution gave Congress no general power of inflicting punishment, and conferred no express power on either House of Congress to punish for contempts, and that the right of the House of Representatives to punish for contempt of its authority or a breach of its privileges can derive no authority from the powers of Parliament in this respect.

As to the ground of implication by necessity, the Court in terms refused to decide. The Court did say that but little aid for the proposition is found in the late English cases, which are quoted from approvingly. *It is perfectly apparent that the Court thought the proposition unfounded, and the entire trend of the opinion is against it.*

On page 182, in the discussion already quoted, of the "life, liberty and property clause", the Court says that the Constitution in that provision contains the strongest implication against punishment by order of the legislative body.

In discussing the English cases, the Court says:

> "But perhaps the most satisfactory discussion of this subject, as applicable to the proposition that the two Houses of Congress are invested with the same power of punishing for contempt, and with the same peculiar privileges, and the same power of enforcing them, which belonged by ancient usage to the Houses of the English Parliament, is to be found in some recent decisions of the Privy Council. That body is by its constitution vested with authority to hear and decide appeals from the courts of the provinces and colonies of the kingdom.
>
> "The leading case is that of *Kielley* v. *Carson and Others* (4 Moo. P. C. 63) decided in 1841. There were present at the hearing Lord Chancellor Lyndhurst, Lord Brougham, Lord Denman, Lord Abinger, Lord Cottenham, Lord Campbell, Vice-Chancellor Shadwell, the Chief Justice of the Common Pleas, Mr. Justice Ers-

kine, Dr. Lushington and Mr. Baron Parke, who delivered the opinion, which seems to have received the concurrence of all the eminent judges named.

"Measuring the weight of its authority by the reputation of the judges, who sat in the case and agreed to the opinion, it would be difficult to find one more entitled on that score to be received as conclusive on the points which it decided.

"The case was an appeal from the Supreme Court of Judicature of Newfoundland. John Kent, one of the members of the House of Assembly of that island, reported to that body that Kielley, the appellant, had been guilty of a contempt of the privileges of the House in using towards him reproaches, in gross and threatening language, for observations made by Kent in the House; adding: 'Your privilege shall not protect you.' Kielley was brought before the House, and added to his offence by boisterous and violent language, and was finally committed to jail under an order of the House and the warrant of the speaker. The appellant sued Carson, the speaker, Kent, and other members, and Walsh, the messenger, who pleaded the facts above stated, and relied on the authority of the House as sufficient protection. The judgment of the court of Newfoundland was for the defendants, holding the plea good.

"This judgment was supported in argument before the Privy Council on the ground that the Legislative Assembly of Newfoundland had the same parliamentary rights and privileges which

belonged by usage to the Parliament of England, and that, if this were not so, it was a necessary incident to every body exercising legislative functions to punish for contempt of its authority. The case was twice argued in the Privy Council, on which its previous judgment in the case of *Beaumont* v. *Barrett* (1 Moo. P. C. 59) was much urged, in which both those propositions had been asserted in the opinion of Mr. Baron Parke. Referring to that case as an authority for the proposition that the power to punish for a contempt was incident to every legislative body, the opinion of Mr. Baron Parke in the later case uses this language:

> 'There is no decision of a court of justice, nor other authority, in favor of the right, except that of the case of *Beaumont* v. *Barrett*, decided by the Judicial Committee, the members present being Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine and myself. Their Lordships do not consider that case as one by which they ought to be bound on deciding the present question. The opinion of their Lordships, delivered by myself, immediately after the argument was closed, though it clearly expressed that the power was incidental to every legislative assembly, was not the only ground on which that judgment was rested, and therefore was, in some degree, extra-judicial; but besides, it was stated to be and was founded entirely on the *dictum* of Lord Ellenborough in *Burdett* v. *Abbott*, which *dictum*, we all think, cannot be taken as authority for the abstract proposition

that every legislative body has the power of committing for contempt. The observation was made by his Lordship with reference to the peculiar powers of Parliament, and ought not, we all think, to be extended any further. We all, therefore, think that the opinion expressed by myself in the case of *Beaumont* v. *Barrett* ought not to affect our decision in the present case, and, there being no other authority on the subject, we decide according to the principle of the common law, that the House of Assemby have not the power contended for. They are a local legislature, *with every power reasonably necessary for the exercise of their functions and duties*, but they have not what they erroneously supposed themselves to possess—the same exclusive privileges which the ancient law of England has annexed to the House of Parliament.' (Italics ours.)

In another part of the opinion the subject is thus disposed of:

'It is said, however, that that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs, as a legal incident by the common law, to an assembly with analogous functions. But the reason why the House of Commons has this power is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo parliamenti*, which forms a part of the common law of the land, and according to

> which the High Court of Parliament before its division, and the Houses of Lords and Commons since, are invested with many privileges, that of punishment for contempt being on
>
> "The opinion also discusses at length the necessity of this power in a legislative body for its protection, and to enable it to discharge its law-making functions, and decides against the proposition. But the case before us does not require us to go so far."

Justice Miller then discusses the existence of the power expressly granted to Congress to punish for contempt, and says that it extends to members for contempt, for disobedience of rules and to compel attendance, and sees no reason to doubt that this punishment may be imprisonment (189, 190).

In contested election cases, the right to call witnesses and compel testimony exists (190).

Where the question of impeachment is before either body acting in its appropriate sphere, the right to compel testimony is given (190).

It is then held that the right to punish for contumacy exists only in cases where the testimony is required in a matter into which the House has jurisdiction to inquire, and that neither House possesses the general power of inquiring into the private affairs of the citizen (190).

The Court then holds that in making the inquiry at which Kilbourn was called to testify, the House not

only exceeded the limit of its own authority, but assumed a power which could only be exercised by another branch of the Government because it was judicial.

Under our laws, the powers entrusted to government are divided into the three grand departments. This is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in certain specific cases. The power asserted by the resolution of inquiry was judicial and not legislative, and therefore was beyond the power of the House, the resolutions and orders were void, and the imprisonment was unlawful (190 to 196).

The Court then takes up *Anderson* v. *Dunn* and expressly overrules first, the holding that the House of Representatives possesses the general power of punishing for contempt; and second, that its judgment of contempt cannot be inquired into.

The cases in which Congress can punish even coercively for contempt are very limited, as we have already attempted to show; and if they are proceeding in a matter beyond their cognizance this can be shown. The Court says the later English cases have taken a different view from that stated in *Anderson* v. *Dunn*, and that that case was cited in argument, but not followed in *Keilley* v. *Carson*. The Court adopts the language of Mr. Justice Hoar in *Burnham* v. *Morrissey*, 14 Gray, 226, in which it is said that under a written constitution, it is always the duty of the judiciary in proper cases to determine whether the powers of any branch of the government, including the legisla-

ture, have been exercised in conformity to the constitution (196 to 200).

Finally, as to the Speaker and members of the House, the Court held that they were protected by their constitutional privilege, and could not be liable in damages for their conduct as members of the House. The Sergeant-at-Arms, however, was held liable (200 to 205).

Mr. Justice Miller's own comment upon this decision is valuable and interesting and is found in his Lecture on Constitutional Law (pp. 414–415).

In *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, a petition was filed by the Commission to compel certain individuals to answer questions put by the Commission in making an inquiry. The lower Court held Section 12 of the Act, under which the proceeding was brought, to be unconstitutional because it imposed a non-judicial duty on the courts. This section authorized the Commission, upon refusal of a witness to appear and testify, to apply to the appropriate circuit court for an order compelling appearance and testimony, and for a disobedience of that order, the witness might be punished by the Court for contempt.

The majority of the Court, in an opinion delivered by Harlan, *J.*, held this to be a judicial question properly imposed on the Court. In the course of the opinion he says:

> "The views we have expressed in the present case are not inconsistent with anything said

or decided in those cases. They do not, in any manner, infringe upon the salutary doctrine that Congress (excluding the special cases provided for in the Constitution, as, for instance, in section two of article two of that instrument) may not impose upon the courts of the United States any duties not strictly judicial. The duties assigned to the circuit courts of the United States by the 12th section of the Interstate Commerce Act are judicial in their nature. The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution, and considered in *Anderson* v. *Dunn*, 6 Wheat. 204, and in *Kilbourn* v. *Thompson*, 103 U. S. 168, 190, of the exercise by either house of Congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under

the law of the land, by a competent judicial tribunal having jurisdiction in the premises" (485).

"The question of punishing the defendants for contempt could not arise before the commission; for in a judicial sense there is no such thing as contempt of a subordinate administrative body" (488–9).

In the case of *In re Chapman*, 166 U. S. 661, a tariff bill adopted by the House was pending in the Senate with a large number of proposed amendments, among them some amendments providing for different rates on sugar; the Senate adopted a preamble and resolutions raising a sub-committee with full power of investigation into certain charges made in the newspapers that members of the Senate were yielding to corrupt influences in the consideration of this legislation.

Chapman, a New York stock broker, was called as a witness and asked whether during certain months he bought and sold sugar stocks in the name of any United States Senator. He refused to answer. He was then indicted in the Supreme Court of the District of Columbia, convicted and sentenced to imprisonment under Sec. 102 of the Revised Statutes U. S., and his case was affirmed by the Court of Appeals. He applied to this Court for discharge on *habeas corpus* on the ground that Sec. 102 was unconstitutional, either because it amounted to a delegation to the criminal court of the exclusive jurisdiction and power to punish the acts defined, and thus deprived the Houses of Congress of their constitutional

functions, or, in the alternative, that the law was bad because subjecting recalcitrant witnesses to be twice put in jeopardy for the same offense.

The Court said:

> "The refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the Senate, of course, constitutes a contempt of that body, and by the statute this is also made an offense against the United States. . . . We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended. . . . It is improbable that in any case, cumulative penalties would be imposed, whether by way of punishment merely, or of eliciting the answers desired. But it is quite clear that the contumacious witness is not subjected to jeopardy twice for the same offense, since the same act may be an offense against one jurisdiction and also an offense against another; and indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu* and capable of standing together" (671).

This Court has in these cases held that Congress has no general power to punish for contempt, but has recognized the power to compel witnesses to testify in cases within the jurisdiction of Congress.

Aside from *Anderson* v. *Dunn*, this Court has had before it, only cases involving compulsion to testify.

So far as the record shows *Anderson* v. *Dunn* may have been of the same character. We may admit this power, but we say it is confined to the power to *coerce* the testimony. While at first glance, there may seem some discrepancy between this statement and the language of this Court, it is purely verbal.

Throughout the cases discussed, this Court speaks of punishing for contempt. But, as this Court has shown in *Gompers* v. *Bucks Stove Co.*, 221 U. S. 441, contempts are partly civil and partly criminal, and may be punished in either aspect. The character of the punishment often serves to distinguish between the two classes of cases. If it is for civil contempt, the punishment is remedial, and for the benefit of the complainant, though this may often be done by imprisonment to coerce the defendant to do an affirmative act. In such case the defendant may release himself at any time by doing the act. On the other hand, as where a defendant does a forbidden act, it is a criminal offense, and he is punished for that crime as for any other. Such acts are infractions of the law, visited with punishment as such, and originally prosecuted only by the usual criminal procedure. *Gompers* v. *U. S.*, 233 U. S. 610, 611. Contempt is a specific criminal offense. *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 392.

The cases here have involved efforts to coerce witnesses to testify. The witnesses were punished for their refusal by the civil proceedings to coerce them to do the act required. It is only in such sense that they may

properly be said to be punished by either House of Congress.

But when it was desired to enforce criminal punishment for the specific crime involved, for the past act of refusing to testify, the matter was properly turned over to the judiciary, where all other crimes are punishable.

So the two punishments have not the same object, and do not constitute double jeopardy—one is merely process to compel testimony, while the other is prosecution for a crime. The two remedies may be invoked in the same case, as indeed they were in the Kilbourn case.

This is really the theory of the *Chapman* decision. Indeed in the Court of Appeals (8 App. Cas. D. C. 302, 315) Justice Morris so phrased it:

> " The offense of refusing to answer an interrogatory either in a court of justice, or before one of the Houses of Congress, or before any Committee of either House, is not an offense in the sense of the criminal law, unless it is specially so made as in this case, by statute; and its punishment as a contempt is not punishment in the legal or constitutional sense, but merely process in aid of the administration of justice. And this is so much the case that the contempt is held to be purged upon reconsideration of his action by the party in contempt, and his consent to answer as required. The punishment for such contempt is in all cases that the party stand committed to imprisonment until he consents to answer. This is not punishment or jeopardy, as

> contemplated by law, for an offense cognizable at law. And when the act of refusal to answer is made by statute an offence at law, then and then only is the person put in jeopardy in the sense of the Constitution."

So the case of *Ex parte Nugent*, 18 Fed. Cas. 10, 375, cited by the Court below, was one in which the Senate had jurisdiction to make the inquiry, and the witness was committed until he should answer.

The distinction here made is clearly pointed out in *Re Clark*, 65 Conn. 17 (1894). There the statute provided that if a witness called before a grand jury refused to answer a proper question, the jurors might complain to a justice of the peace, who was authorized to commit the witness to jail until he should give the evidence required. The statute was objected to as creating a criminal offense which could properly be punishable only in a judicial proceeding. In holding that the statute merely provided process to compel testimony, the Court said (32):

> "The real nature of the power to compel a citizen to answer a proper question, when a refusal to answer obstructs the necessary, immediate execution of law, has been obscured by the habit of calling every such refusal a contempt. It is a contempt in the sense that every open defiance of law is a contempt of the authority of the state; it is a contempt of court when done in the course of a judicial trial; but the summary enforcement of an answer is not an exercise by the court of its judicial power to punish contempt of

court as a criminal offense, but of its administrative power to enforce a law, which if enforced at all must be enforced at once."

(2) *The English Cases hold that the power to punish as a criminal act is not supported by the plea of necessity.*

Kielly v. *Carson*, 4 Moore Privy Council 63, decided in 1842, is the leading case. The facts, and the character of the court have already been set forth in the quotation from *Kilbourn* v. *Thompson*. The case was twice argued before the Privy Council. The conclusion is that the House of Assembly of Newfoundland did not possess the power of arrest with a view to adjudication on a complaint of contempt committed out of its doors.

To the contention that the power belongs to the House of Commons of England, and therefore it belongs as a legal incident by the common law, to an assembly with analogous functions, the Court said:

> " The reason the House of Commons has the power is not because it is a representative body with legislative functions, *but by virtue of ancient usage and prescription* (89). (Italics ours.)
>
> We decide according to the principle of the common law that the House of Assembly has not the power contended for. They are a local legislature, *with every power reasonably necessary for the* proper exercise of their functions and duties, but they have not what they have erroneously supposed themselves to possess—the same exclusive privileges which the ancient

> law of *England* has annexed to the House of Parliament" (92). (Italics ours.)

In 1858 the question again came before the Privy Council in *Fenton* v. *Hampton*, 11 Moore P. C. 347.

Fenton was Speaker of the Legislative Council of Van Dieman's Land. A committee of that body having been appointed to inquire into certain alleged abuses in the convict department, a subpœna was issued to Hampton. He declined to appear. The Council then resolved that Hampton was guilty of contempt, and that the Speaker should issue his warrant for Hampton's arrest to be kept in the custody of the sergeant-at-arms at the pleasure of the Council. Accordingly the sergeant-at-arms held him in custody until the Council was prorogued. Suit for trespass ensued. The Court followed *Keilly* v. *Carson*, feeling it unnecessary to enlarge upon the opinion there.

The judgment of Chief Justice Valentine of the Court below, is interesting. In discussing the argument of necessity, he said:

> "The true deduction from all the cases appears to be, that necessity may be taken as the original foundation of the powers, but not that it alone constitutes them; necessity is an essential element to their existence, but it is usage that gives them the sanction of the law (p. 354).

The argument is based upon the legal maxim ***quando lex aliquid concedit concedere videtur et illud sine quo res ipsa esse non potest.***

It becomes, therefore, all important to consider the true import of this maxim, and the extent to which it has been applied. After the fullest research which I have been able to bestow, I take the matter to stand thus: Whenever anything is authorized, and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment. But if, when the maxim comes to be applied adversely to the liberties or interests of others, it be found that no such impossibility exists, that the power may be legally exercised without the doing that something else, or even going a step farther, that it is only in some particular instances, as opposed to its general operation, that the law fails in its intention, unless the enforcing power be supplied, then, in any such case, the soundest rules of construction point to the exclusion of the maxim, and regard the absence of the power which it would supply by implication as a *casus omissus*" (360).

Doyle v. *Falconer*, L. R., 1 P. C. 328.

A member of the Legislative Assembly of Dominica, when called to order by the Speaker and House, retorted "you are a disgrace to the House" and refused to apologize. He also further interrupted and obstructed the business before the House. He was committed on warrant. He sued for assault and false imprisonment; the cause came up on demurrer to a plea. It was contended that the Assembly must possess the

power to punish for a contempt, *committed in its presence* since *such power was indispensably necessary to its existence.* Of this the Judicial Committee of the Privy Council said:

> " It is necessary to distinguish between a power to punish for contempt, which is a judicial power and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self-preservation. If a member of a Colonial House of Assembly is guilty of disorderly conduct in the House while sitting he may be removed or excluded for a time or even expelled; but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another" . . . " On the other hand it may be urged with equal force, that the power contended for is of a high and peculiar character; that it is in derogation of the liberty of the subject, and carries with it the anomaly of making those who exercise it judges in their own cause and judges from whom there is no appeal; and that if it may be safely entrusted to magistrates, who would all be personally responsible for any abuse of it to some higher authority it might be dangerous in the hands of a body which, from its very constitution, is practically irresponsible" (341).

In *Hill* v. *Weldon*, 5 New Brunswick, 1 (1845), the House of Assembly imprisoned Hill as punishment for

a breach of their privileges in publishing a libel on certain members of the House for the part taken by them in debate in the House. The Court thus put the question (p. 46):

> "Was the power vested in the House of Assembly at its first creation, as a necessary incident; by which term we understand an essential attribute without which the Assembly could not discharge its proper functions"?

Following *Kielly* v. *Carson*, the question was answered in the negative, and the Sergeant-at-Arms was held liable in damages.

(3) *Administrative tribunals performing functions closely akin to the judicial, have accomplished those functions without the extraordinary power to punish insult or defamation, and even without the power to themselves compel testimony.*

The most striking illustration is the Interstate Commerce Commission, created in 1887, and having jurisdiction almost co-extensive territorially with this Court, and over matters of the utmost magnitude. That body has no greater power than the humblest citizen to repel insult whether at its hearings or in the press; it can compel testimony only upon the order of a federal court, as shown in the *Brimson* case, *supra*. Yet that body has faithfully and efficiently performed its duties, and has found immaterial its lack of the power now asserted by Congress as essential to existence.

A dispute or interference arising in the Patent Office between two applicants over the priority of invention is settled upon testimony taken by depositions. The Patent Office itself has no authority to issue subpœnas or to compel testimony. Again application must be made to the courts (see sections 4906 and 4908, R. S. U. S.). From the decision of the Commissioner of Patents in such cases an appeal lies to the Court of Appeals of the District of Columbia, whose decision may be reviewed by this court on *certiorari*. The various tribunals in the Patent Office have existed and efficiently performed their duties of hearing and deciding for over one hundred years, without the power of inflicting punishment upon one who disturbed their proceedings or endeavored to influence their judgment in a pending case, or even upon one who refused to testify.

So, in the General Land Office, in contests over rival applications for land, the decision is based upon testimony taken before the Register and Receiver. Until the act of June 31, 1903, 32 Stat. 790, there existed no power to even compel testimony in such instances. And when that power was conferred, as necessary, it was not given to the officials of the Land Office, but to the courts.

In all of these bodies, cases involving vast sums are annually disposed of, and they have the respect and confidence of the country, and have successfully maintained their power and dignity. And they have done

this without the right to summarily punish the citizens of this country for alleged crimes.

(4) *Not all courts have the power asserted by Congress.*

The sole ground of the power asserted here cannot be necessity. Historically it has never existed as to all the English courts.

This is clearly shown in *Rhinehart* v. *Lance*, 43 N. J. L. 311, where the court, in holding that a justice of the peace has not such power, says :

> "The power to remove persons who, by disorderly conduct, interfere with the business of the court, is a power essential to the very existence of the court, and is implied from the creation of the court. It belongs to all deliberative bodies, judicial and legislative, and is necessary to their self-preservation. Without such a power it would be impossible to perform the functions for which such bodies are created.
>
> But the power to commit for contempt is a power of inflicting a penal sentence for an offence, and the validity of the sentence will depend upon the jurisdiction of the court to pronounce it. Such a power is not a necessary incident of a court of justice, and therefore is not granted by implication. It can only be derived from the common law or by a legislative grant of such a power" (320).

In re Mason, 43 Fed. 510, 515, where the question arose as to the power of a United States Commissioner

to compel by imprisonment a witness to testify, the Court said:

> "The power is not, and never has been an incident to the mere exercise of judicial function, and such power cannot be upheld upon inferences and implications, but must be expressly conferred by law."

In *Queen* v. *Lefroy*, L. R., 8 Q. B. 134 (1873), the court held that a county court, made a court of record by 9 and 10 Vict. c. 95, secs. 1 and 2, and given by this statute power to punish contempts, committed in its presence, had no power to punish a publication reflecting on the conduct of the judge. The Court held that a county court is not like the Queen's Bench, Common Pleas, and Exchequer, who were part of the *aula regis*.

(5) *Congress may by law provide additional safeguards, if desirable.*

We think we have shown that the remedies of self-help, of ejecting disorderly persons and coercing testimony are sufficient.

The Act of July 1, 1882 (22 Stat. 126; 6 Fed. Stat. Anno. 691) now Sections 881 to 890 of the Code of the District of Columbia, makes elaborate provision for the punishment of disorder in the Capitol grounds.

Sec. 1819, R. S., provides that all laws and regulations of the District of Columbia for the preservation of peace and order shall extend to the Capitol Square, upon application by one of three individuals named;

Sec. 15 of the Act of July 29, 1892 (27 Stat. 322) extends all such laws to all public buildings and grounds in the District of Columbia, which includes, of course, the Capitol.

Secs. 1820 and 1821 R. S. authorize the sergeants-at-arms of the Senate and House to make necessary regulations for proserving peace and order, and provide for a Capitol police for the purpose of preventing disorder. Of course prosecutions for violation of these statutes and regulations are in the local court.

As to disorder, see Sections 1819 to 1821, R. S. U. S. and the act of July 1, 1882 (22 Stat. 126; 6 Fed. Stat. Am. 691). By these, elaborate provision is made to prevent disorder in the Capitol buildings and grounds, and a Capitol Police are created for that purpose. If necessary, the local law may at any time be extended to the Capitol grounds. Prosecutions are in the local criminal courts.

Punishment for refusal to testify is provided for in Sections 102 and 104 R. S. U. S. before referred to.

So it is made a crime to attempt to bribe a member of Congress to influence his action in any matter pending in Congress or before a committee (Sec. 111 of the Criminal Code); or for an employee of the United States to make a political contribution to a member of Congress (Sec. 121); and numerous acts of members of Congress are punishable as crimes (Sections 110, 112, 113, 114, 118).

As to breaches of its privileges, Congress was apparently content to let them be punished by the local

law wherever the breach happened. This could be done usually under the law of assault or libel. See Jefferson's Manual, Section III, Privilege, where he says that Congress may provide by law for the giving full effect to the enjoyment of the privilege of freedom from arrest, but has passed no such law. He then enumerates four ways in which a member may be discharged for such arrest.

Clearly under clauses 17 and 18 of Section 8 of Art. I, Congress may make other laws to protect itself. It may make a breach of its privileges a crime punishable in the federal courts, without leaving them to the state tribunals, whether the breach be by assault or libel. So it may reach an unlawful attempt to influence its deliberations.

In *Matter of Barnes*, 204 N. Y. 108, the statute provided that if a person subpœnaed and brought before a legislative committee, body or other officer specified, refused without reasonable cause to answer a legal and pertinent question, etc., if the hearing was before a body other than a court of record, a judge of a court of record may forthwith commit the offender to jail until he answers, etc. This was held constitutional as applied to a legislative committee. Note that the statute puts the question to a judge of a court of record, just as was done by Congress with reference to the Interstate Commerce Commission.

In closing this branch of the discussion, we cannot better sum up the argument than is done in Jefferson's Manual (which Manual it is provided by the rules of

the House, Rule XLIV, shall govern their parliamentary practice so far as applicable). After describing several prosecutions by the two Houses for breaches of privilege, he says (p. 133):

> "In debating the legality of this order, it was insisted, in support of it, that every man, by the law of nature, and every body of men, possesses the right of self-defense; that all public functionaries are essentially invested with the powers of self preservation; that they have an inherent right to do all acts necessary to keep themselves in a condition to discharge the trusts confided to them; that whenever authorities are given, the means of carrying them into execution are given by necessary implication; that thus we see the British Parliament exercise the right of punishing contempts; all the State Legislatures exercise the same power, and every court does the same; that, if we have it not, we sit at the mercy of every intruder who may enter our doors or gallery, and, by noise and tumult, render proceeding in business impracticable; that if our tranquillity is to be perpetually disturbed by newspaper defamation, it will not be possible to exercise our functions with the requisite coolness and deliberation; and that we must therefore have a power to punish these disturbers of our peace and proceedings. To this it was answered, that the Parliament and courts of England have cognizance of contempts by the express provisions of their law; that the State Legislatures have equal authority because their powers are plenary; they represent

their constituents completely, and possess all their powers, except such as their constitutions have expressly denied them; that the courts of the several States have the same powers by the laws of their States, and those of the Federal Government by the same State laws adopted in each State, by a law of Congress; that none of these bodies, therefore, derive those powers from natural or necessary right, but from express law; that Congress have no such natural or necessary power, nor any powers but such as are given them by the Constitution; that that has given them, directly, exemption from personal arrest, exemption from question elsewhere from what is said in their House, and power over their own members and proceedings; for these no further law is necessary, the Constitution being the law; that, moreover, by that article of the Constitution which authorizes them 'to make all laws necessary and proper for carrying into execution the powers vested by the Constitution in them' they may provide by law for an undisturbed exercise of their functions, *e. g.*, for the punishment of contempts, of affrays or tumult in their presence, &c.; but, till the law be made, it does not exist; and does not exist from their own neglect; that, in the meantime, however, they are not unprotected, the ordinary magistrates and courts of law being open and competent to punish all unjustifiable disturbances or defamations, and even their own sergeant, who may appoint deputies *ad libitum* to aid him, 3 Grey, 59, 147, 255, is equal to small disturbances; that in requiring a previous law, the

Constitution had regard to the inviolability of the citizen, as well as of the member; as, should one House, in the regular form of a bill, aim at too broad privileges, it may be checked by the other, and both by the President; and also as, the law being promulgated, the citizen will know how to avoid offense. But if one branch may assume its own privileges without control, if it may do it on the spur as the occasion, conceal the law in its own breast, and, after the fact committed, make its sentence both the law and the judgment on that fact; if the offense is to be kept undefined and to be declared only *ex re nata*, and according to the passions of the moment, and there be no limitation either in the manner or measure of the punishment, the condition of the citizen will be perilous indeed. Which of these doctrines is to prevail, time will decide. Where there is no fixed law, the judgment on any particular case is the law of that single case only, and dies with it. When a new and even a similar case arises, the judgment which is to make and at the same time apply the law, is open to question and consideration, as are all new laws. Perhaps Congress in the meantime, in their care for the safety of the citizen, as well as that for their own protection, may declare by law what is necessary and proper to enable them to carry into execution the powers vested in them, and thereby hang up a rule for the inspection of all, which may direct the conduct of the citizen, and at the same time test the judgments they shall themselves pronounce in their own case."

III.

The fact that the House of Representatives was investigating a charge that a civil officer should be impeached, does not alter the rule, or confer any greater power upon the House.

A. There is no reason for such greater power. On the contrary, the duties of the House in passing legislation are of far greater importance. The distinction would be difficult of application.

It is difficult to see why the powers of the House of Representatives in this particular should depend upon the character of their deliberations at the time to which the act of criticism relates. The House is essentially for the purpose of legislation. In some instances it has the sole power of initiating a bill. Such powers are of the utmost importance to the nation, particularly when compared to the incidental one of determining whether or not a complaint shall be made to the Senate which may result in the removal of an individual from a civil office.

However, the Court below has rested its decision upon a distinction which he thought existed in the character of the duties. He thinks that in impeachment matters the House is acting as a court, and therefore has all the powers of any court to punish for contempt. He fully agrees with us that in all other instances the House of Representatives has no power to punish as for contempt any act committed outside of its walls. But

he confines this rule to those occasions when Congress is engaged in legislation, as to which he thinks discussion and criticism are indispensable (R. 147). He is careful to state that under such circumstances the House is without power to punish criticisms, no matter how fierce or unfounded they may be, nor how malicious the motives of the defamer, nor how bitter the attack upon the honesty and good faith of the member of Congress.

As a practical matter this distinction cannot be made. It would be difficult to determine just when the House took on this peculiar character. For instance, the impeachment resolution against President Johnson was referred to the Committee on Reconstruction and reported back favorably the next day. That Committee had probably taken testimony before on reconstruction matters, for legislative purposes, and talk of impeachment had been common, even before Secretary Stanton informed the House by message of his removal from office. President Johnson had been most bitter in his denunciation of Thaddeus Stevens and other members of the Committee on Reconstruction, even going so far as to say in public speeches that they should be hung. According to the rule here, for the contemptuous references made before the impeachment resolution was introduced, Stevens could rely only on the law of libel for protection; while afterwards it was within the power of the House to imprison the President for his utterances.

In the present case, when did the House become immune from criticism? On December 14, 1915, when

the federal jurors in New York City were investigating charges that Representative Buchanan had violated the law, the latter in a speech in the House charged the appellant with malfeasance, and impeached him; and the charge was referred to the Judiciary Committee for consideration.

Did the power of the House arise at that instant or was further action required? Would it have been contempt on the part of the newspapers to refer to Buchanan's course as defense by impeachment? When, on January 12, 1916, Representative Buchanan again impeached the appellant, and his resolution was referred to the Judiciary Committee, did the House then become a Court? Did the numerous newspaper editors who criticised this action on the part of the member as well as of the House itself become liable to punishment at the hands of the House? And if so, has the right to criticise yet become free? On August 4, 1916, the Judiciary Committee reported to the House that they had come to the conclusion that no further proceedings should be had with reference to the resolution of impeachment, and recommended that the resolution lie upon the table and that no further proceedings be had thereon. This is not the way in which a charge of misconduct would be disposed of by a court. A grand jury would either indict or ignore. But is this a final disposition of the case? If it is, under *Patterson* v. *Colorado*, 205 U. S. 454, individuals may now freely express their opinion of the conduct of the various matters. But if Congress may remove the resolution from the table

upon a simple vote, and proceed with it, is it not yet pending? And is not this a question for the House to determine if it should arise?

Do not these various questions show the lack of any need for a difference in the powers of Congress, irrespective of the particular matters upon which they are engaged?

B. The House of Representatives when sitting in impeachment proceedings is not a Court, and has no power to punish criminal contempts by analogy to Courts.

(1) *This proceeding is in the nature of a criminal prosecution for a past act, not a coercive measure to compel obedience.*

In this case there is an attempt on the part of the House of Representatives to take jurisdiction of and punish an alleged criminal offence. The proceedings are wholly to punish a past transaction. (*Gompers* v. *Buck Stove and Range Co.*, 221 U. S. 418). In such a proceeding appellant is entitled to a procedure according to due process of law. He has been denied these rights for these reasons:

(*i*) The proceeding is not entitled "United States *v.* H. Snowden Marshall", nor is the charge laid as "against the peace and dignity of the United States". It is alleged to be a breach of the privileges of the House, and at most a contempt of and offense *against* the House of Representatives.

(*ii.*) The charge is not prosecuted by the United States or its Attorney-General.

(*iii.*) There is no procedure by indictment or information or by any recognized form of criminal procedure, and the warrant is void because not supported by indictment, or by oath or affirmation showing probable cause, as required by the Fourth Amendment.

(*iv.*) The trial was not to occur in the place where the offence was committed nor before a court.

Whether or not the House has power by coercive measures to compel witnesses to attend and to testify is not an issue in this case. But such power is entirely adequate to enable it to perform its functions. The criminal jurisdiction to punish for past transactions is an entirely different jurisdiction, for it necessarily involves the jurisdiction to try and punish persons who have committed "infractions of the law", "visited with punishment as such." (*Gompers* v. *U. S.* 233 U. S. 604.)

The fundamental distinction between these two proceedings has been authoritatively estabablished in the two *Gompers* cases.

(2) *The House of Representatives when sitting in impeachment proceedings is not a Court and is in no way similar to a judicial Court of record.*

(a) Nature of impeachment proceedings.

We must examine more fully into the constitution, nature and duties of this so-called Court to determine whether or not it comes within the category of such Courts of record as have been held to have summary power to protect their dignity by punishment for contempts. It is true that the Senate, adopting the nomenclature applied to the House of Lords, has been called the High Court of Impeachment, and that the House of Representatives has been called the court for preferring articles of impeachment. This is merely a matter of terminology, and when the rights and liberties of a citizen are in question, mere nomenclature should be given little consideration. The rights secured by the Constitution and the powers conferred by it are matters of substance; therefore, it becomes necessary to analyze the nature, duties and functions of the House of Representatives when considering whether or not it will prefer articles of impeachment to the Senate in order that we may reach a correct conclusion as to its inherent powers.

Undoubtedly the machinery of impeachment was modeled after the English system. In so far as the House of Representatives has the sole power of impeachment it is like the House of Commons. So far as the Senate has the sole power to try impeachments, remove from office, and disqualify to hold any other office of trust, it is like the House of Lords. But these tribunals were brought into existence and their powers

defined by the Constitution. The powers of the House of Commons and the House of Lords, on the other hand, were the result of a growth and development, over a long period of political struggle. The criminal jurisdiction of Parliament has origin in the general judicial power of the *Curia Regis* established by William the Conqueror. It continued to wield the judicial power for punishing crimes committed by high offenders as well as the power of removing them from office. The two powers, however, are essentially distinct. The criminal power involves the punishment of a person for a violation of the penal laws. The impeaching power is essentially political, a process by which a person unfit to execute his political duties is removed from office. The Constitution wisely separated these two powers. The punishment for a violation of the penal laws was expressly left to the regular course of law in law courts (Const. Art. I, Sec. 3, Cl. 7). The power of the Senate to remove from office is as essentially a political power as the power to remove an employee from the civil service after trial and a hearing. It is similar to the power possessed by the Governor of the State of New York to remove after a hearing a sheriff, county clerk, or district attorney (N. Y. Const. Art. X, Sec. 1). In performing these duties none of these bodies is acting in a judicial capacity as that term is understood in the Constitution, though they frequently do follow the forms of judicial procedure as the best means of arriving at a just decision. This proposition has already been briefly

discussed. It is greatly elaborated in a Monograph on The Impeachment of the Federal Judiciary, by Mr Wrisley Brown, published in the *Harvard Law Review*, June, 1913 (Vol. 26, p. 684). Mr. Brown is a special assistant to the Attorney General. He conducted the original investigation which led to the impeachment of Judge Archbald, and was designated to assist the House managers in the trial.

(*b*) **House of Representatives is analogous to neither a court nor a grand jury.**

Coming more particularly to the nature and functions of the House of Representatives in exercising its power of impeachment, we find it in no way resembles a judicial proceeding. The House of Representatives is under no obligation to make any investigation or hear any evidence before it prefers its articles of impeachment to the Senate. This power may be exercised in its ordinary legislative form of proceeding. It is sometimes denominated the Grand Inquest of the State, but it is not even that. A Grand Jury is sworn to make a true presentment of all matters that are brought before it. This it must do on sworn testimony and presents a sworn accusation. The members of the House, however, are not sworn to make any true presentments nor required to proceed upon sworn evidence or in any way in the manner pursued by judicial tribunals (*Cushing "Law & Practice of Legislative Assemblies", 2nd Ed., sec. 2556*). When the Grand Jury presents its indictment to the

Court, its duties are ended. It is not the prosecutor and never was. But the House is the prosecutor of impeachment trials before the Senate. It is usually represented by "managers" who present the case to the Senate, draw the pleadings, and the replication to the respondent's answer, demand judgment, examine witnesses and argue the prosecutor's side before that tribunal. The Grand Jury's action is always subject to review by the Court. If it proceeds irregularly and not in accordance with law, upon no evidence, with a disqualified juror, the Court can quash an indictment on a plea in abatement. But the action of the House is subject to no such limitation.

In fact, the House usually proceeds by one of its regular legislative committees to make any necessary investigation. In this case, it made use of its Committee on the Judiciary, whose regular duty was to investigate and report on proposed legislation. The House of Representatives is in all respects similar to those individuals who alone under certain statutes are authorized to make complaints in criminal or penalty actions. Any one could now file articles of impeachment with the Senate, but the Senate would have no jurisdiction to take any proceedings thereon because under the Constitution such complaint must be made by the House of Representatives (*Cushing "Law & Practice of Legislative Assemblies"*, 2nd Ed. pp. 979, 981).

Had the Constitution contemplated that the House of Representatives should act as a judicial tribunal before

it filed articles for impeachment with the Senate there would undoubtedly have been some provision tending to secure judicial action. In the case of a trial for impeachment, the Senate is expressly constituted as a different tribunal from that when it sits in legislative matters; for in any impeachment trial the Senate must be upon "oath or affirmation". This is the procedure which constitutes the Senate into a political court; that is, a court for the trial of political offenses and the taking away of political privileges. The Senate is a Court in no other respect and for no other purpose.

With this description of the duties and functions of the House of Representatives in impeachment proceedings before us it is very evident that it is a body of an entirely different nature from the courts of justice created by Article III of the Constitution, which have the power to punish criminal contempts by regular criminal procedure, because they are modeled after the King's Courts of Record.

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To recapitulate, the House of Representatives is not a Court; because:

1. A court renders a judgment; this can usually be reviewed by a higher court, and the judges are responsible to impeachment if they act illegally or tyrannically.

The House makes a charge that a certain individual is unfit to hold office; there is no review of their action, nor any mode of inquiring into their conduct.

2. Judges are appointed as experts of law, sworn to do impartial justice.

3. A court proceeds according to settled rules of law, and only upon adequate evidence. The judge, the expert, determines the law, while the jury passes upon the facts, and both are supposed to be disinterested. In a criminal case, the proof must be beyond a reasonable doubt.

Here the House proceeds in its ordinary legislative form (Cushing, Sec. 2556). It need not take evidence, but may impeach upon a motion made by any member (Cushing, Sec. 2563). The law and facts are determined by the members themselves. The members of the House may be greatly interested in the result.

Whatever may be said about the function of the Senate in impeachment proceedings, clearly the House of Representatives is not a court, nor acting by analogy to a court when it prefers the charge.

The House of Representatives is not a grand jury.

(1) A grand jury has no power to punish contempts. The act is not contempt of the grand jury, but of the Court. If the analogy be pursued here, the House would be an arm of the Senate, and it would be the duty of the former to report appellant's action to the Senate as a contempt of the latter.

(2) Grand jurors are sworn to make true presentment of all matters given to them in charge; the Rep-

resentatives take no special oath in impeachment inquiries.

(3) The grand jurors can proceed only on the evidence; the House may proceed on motion and wholly without evidence.

(4) The grand jury is a mere arm of the Court; the House is a wholly independent body.

(5) A court has complete control over the indictment after it is returned. It may quash the indictment for numerous reasons, if jurors be improperly drawn or incompetent; if there be no legal evidence before the grand jury, or if incompetent persons be present at its deliberations. The Senate has no such power over an impeachment.

(6) The grand jurors' functions cease absolutely with the return of the indictment. Those of the House have just begun when the impeachment is made to the Senate. They are the prosecutors, and a number of them are selected to manage the prosecution. The House prepares the articles of impeachment, and may amend them from time to time; when the accused pleads to those articles the House replies, and handles the pleadings as does a prosecutor. There is nothing to compel the House to continue a prosecution they have begun. And judgment cannot be rendered by the Senate except upon their request, and they must be present when it is imposed (Comyns Dig. Parliament, L. 40; Impeachment Trial of Robert W. Archbald, Sen. Doc. No. 1140, 62nd Cong., 3d Ses.).

(*c*) **The functions of the House are analogous to those of a prosecuting attorney.**

The House of Representatives is in reality the sole power which can prosecute a charge of impeachment. While at common law, any subject could initiate such a charge, our Constitution has limited the power to the House. A citizen therefore makes complaint of an impeachable offense to that body, as he would to a district attorney of a crime.

The House thereupon determines whether it will impeach. There is no intermediate body like the grand jury, to which it must or may submit the evidence. It has the absolute right to vote an impeachment and present its charges, without making inquiry into the facts.

True, it will, out of fairness to the officer complained against, usually make inquiry into the facts to see if the charge can be sustained. But in so doing, the House does not turn itself into a grand jury. It is doing what any conscientious prosecutor does. It is endeavoring to ascertain the facts before proceeding.

The district attorney who files an information under the pure food law, the motor boat law, or some law involving minor offenses can not be said to be acting as a court, or even in a judicial capacity, when he talks with the witnesses, and finally decides to file the information. And this function is not changed because the prosecutor is given the right in some jurisdictions to examine witnesses under oath, nor by the fact that the grand jury has been abolished, and he happens to

be the exclusive channel through which a prosecution may be launched.

The subsequent functions of the district attorney are the same as those of the House. He must prosecute the case, and he may dismiss it at any time before the jury is sworn. And he it is who finally asks for judgment.

In truth, the House and the prosecutor are performing identical functions. Each is investigating the facts to see whether the accused should be tried, and as the inquiry proceeds is also preparing the case for trial. The only difference is that the district attorney is looking to the criminal punishment for the act, while the House is considering the removal from office of an unfit person. They may be inquiring into the same case at the same time. Neither of them is then a Court nor acting in a judicial capacity.

(3) *Not every Court has the power to punish for contempt out of its presence.*

We must not be bound by expressions found in some cases and opinions to the effect that every court has the power to protect its dignity by the summary process of punishment for contempt. Such expressions are in most cases applicable to the cases to which they refer; they refer to the jurisdiction of a court presided over by a judge sworn to the impartial administration of the law and a recognized expert in that field. It has been shown above that no so-called argument from necessity is sufficient to justify the existence of such a

power. The power to punish for contempt is a high prerogative power and there is no judicial adoption in English cases or in decisions in the United States of the principle that the power to fine or imprison is necessarily inherent in every court of justice. The power is possessed only by such tribunals as have it by common law or by constitutional or legislative grant (*Rhinehart* v. *Lance*, 43 N. J. Law, 311). A brief examination of some of the cases and the dicta in important English cases will prove useful. The opinion of Mr. Justice Wilmot in *The King* v. *Almon*, found in *Wilmot's Opinion*, *p. 243*, is the source of many inaccurate expressions. This opinion was not a decision in any case, but was prepared by Judge Wilmot after argument and published by his son ten years after his death. The statement in this opinion, that the power of any Court to punish for contempt libels upon its authority by summary procedure was of immemorial usage, has been shown to be inaccurate (see the article by *John Charles Fox*, *24 L. Qu. Rev.*, *pp. 184*, *266*, entitled "*The King* v. *Almon*", and argument of Mr. Storrs before the Senate in the impeachment trial of Judge J. H. Peck, where the authorities are carefully and critically considered and analyzed. *Trial of Judge J. H. Peck by Arthur J. Stansbury*, *p. 372* (*1833*)). The further statement in this opinion that it was necessary for every court, whether of record or not, to have this power was not an accurate statement of the law at that time, nor is it adopted as the law to-day. The correct history of the developments of this power

seems now to be authoritatively established. The *Curia Regis* established by William the Conqueror exercised jurisdiction in both criminal and civil cases (*Madox "History of the Exchequer"*, Chaps. 3 and 19). This Court was also an administrative body, assisting the King in the collection of his revenue. Out of this Court grew first the Exchequer, and later, about the time of Magna Charta, the Common Bench, until finally there became the three courts of King's Bench, Common Bench and Exchequer (*1 Stephen's History of Criminal Law, p. 92; Stubb's Constitutional History of England.*

The origin of this crime of contempt can be traced to the time when the King administered justice. He was personally present with *Curia Regis.* Any insult or disrespect to his Court was an offence against the sovereign. Such an offence was a high misprision, and the indictment must allege it was *coram domine rege* (1 Hawk. P. C., ch. 6, sec. 3). Blackstone treats contempts of the King's prerogative, his title, his courts, as in the same class (4 Black. Com., p. 121–126).

So truly was contempt of court a crime that it was prosecuted only by regular criminal procedure. *Gompers* v. *U. S.*, 233 U. S. 604; 3 Trans. Royal Hist. Soc. N. S. p. 147. Not till the year 1720 was there any summary prosecution of contempt for libeling a court (Art. by John Charles Fox, 24 L. Q. R. 184, 266).

Even after the King ceased to be actually present in his Courts, he was considered present by legal fiction. Writs were returnable *coram ipso rege* (3 Black.

Com. 41). At the time of the adoption of our Constitution, the crime of contempt of court had become established so that any insult to a court of record became a crime punishable as such. *Rhinehart* v. *Lance* (43 N. J. L. 311). What is the significance in limiting this crime to a court of record? It is because only the King's Courts were courts of record. In the United States only our Courts of record created under Article III of the Constitution are modeled after the King's Courts; and an insult to those only is a criminal contempt. It is a crime under some statutes to assault an officer. The officer is the *corpus delecti*. The *corpus delecti* of the crime of contempt of court is a court of record, not a statutory court of record, but such a court as was a court of record at common law. The House of Representatives when sitting in impeachment proceedings is not such a court. Hence reproachful words to the House or to any of its members is not within the common law meaning of the crime of contempt of court.

(4) *It is at least doubtful whether even the district courts of the United States would have power to punish as a contempt the appellant's act.*

The warrant and resolution call on appellant to answer the charge that on March 4th, 1916, at the City of New York he wrote and caused to be published a certain letter. True, appellee in his return says the newspapers in which the letter was printed in New York were circulated also in the District of Columbia and

throughout the United States (R. 15). However, if the point be material, we are entitled to consider the matter upon the language of the charge. It amounts to a claim of right to punish as a crime, an act committed beyond the presence of the body criticised.

Under Section 725 R. S. U. S., now Section 268 of the Judicial Code, the inferior federal courts are without power to punish such acts as contempts. The pertinent part of that section reads:

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, That such power to punish contempts shall not be construed to extend to any cases except the misbehaviour of any person in their presence, or so near thereto as to obstruct the administration of justice."

In *Ex parte Poulston*, 19 Fed. Cas. 1205, Mr. Justice Baldwin, of this Court, held that under this statute the federal courts were without power to punish as contempt an article published in a newspaper pending a trial, and greatly tending to prejudice one of the parties thereto.

This case was followed by Judge Pritchard in *Re Daniels*, 131 Fed. 95, holding the district court of the United States without power to punish an editor who criticised the court for appointing a receiver in a pending case.

It is true that in *U. S.* v. *Toledo Newspaper Co.*, 220 Fed. 458, Judge Killitts held he had power to punish as a contempt a newspaper campaign carried on over quite a period of time and evidently for the purpose of influencing his judgment in a pending case.

In *U. S.* v. *Huff*, 206 Fed. 715, and *In re Independent Pub. Co.*, 228 Fed. 787, the courts exercised the power over publications made out of court.

If there be a conflict between these cases, of course this Court will not here undertake to construe the statute. While we think the reasoning of the earlier cases the better, it is enough for our purpose if there be a conflict or even a doubt about the jurisdiction of the federal courts.

Surely even the most strained doctrine of implied powers will not grant a power by analogy to a tribunal, when there is grave doubt as to the existence of that power in such analogous tribunal.

The statement in the return that appellant's letter was published in New York newspapers which were circulated in the District of Columbia, suggests a comparison with an interesting situation in the law of libel.

From time to time during the last fifty years prosecutions have been started by residents of Washington for libel in newspapers printed elsewhere but circulated in the District of Columbia. The prosecutions were usually, though not always, at the instance of Government officers. These prosecutions have been of great public interest, because if they succeeded, every editor in the country who criticised the President

or his subordinates, or even a member of Congress, was in danger of being dragged from his home to Washington there to be tried for a federal crime.

Removal cases in these proceedings have invariably failed.

In *re Buell*, 3 Dillon, 116, it was held that the indictment did not charge a publication in the District of Columbia.

In *re Dana*, 68 Fed. 886, it was held that the indictment when used as an affidavit was contradictory and insensible, and that libel was not a removable offense.

In this case appears a report of a special committee of the Senate, dated December 15, 1874, signed by Senators Edmunds, Conkling, Freelinghuysen, Wright, Thurman and Stevenson, expressing the view that under a certain act relating to the Courts of the District, no power was given to bring into the District of Columbia, a person charged with the crime of libel.

In *U. S.* v. *Smith*, 173 Fed. 227, the effort was to remove to this District for trial on an indictment for libel, the editor of the *Indianapolis News*. This was one of the so-called Panama Canal libel cases. The articles were contained in the *News*, about fifty copies of which were sent by mail to subscribers in Washington. The Court held that the offense was complete in Indiana, and under the Sixth Amendment to the Constitution the trial must be there. In concluding his opinion, the Court said:

> "To my mind that man has read the history of our institutions to little purpose who does not

look with grave apprehension upon the possibility of the success of a proceeding such as this. If the history of liberty means anything, if constitutional guarantees are worth anything, this proceeding must fail."

And yet Congress, a non-judicial body now asserts, solely by implication, and by analogy to the courts, a right to do that which is beyond the power of the courts.

Conclusion.

To sum up, all the points in this case resolve themselves into one—whether or not the House of Representatives of the United States, having no express power so to do, and not being a court of the United States, can be said to have by implication, as necessary to carry out any of its express powers, the power to arrest, bring before its bar, and punish as a court might a crime, a citizen for the act of writing a letter to the chairman of a sub-committee of the House, in which he strongly criticizes the acts of that committee, or the manner in which, and the motives with which, that committee has investigated the truth of certain charges made against an officer of the government, with a view to his possible impeachment. Bearing in mind the fact that this power, being conceded, involves such punishment without any of the normal safeguards attendant upon the regular administration of justice, and that the power, being conceded, there is no right to review, is

the delegation of such power to the House to be read into the Constitution of the United States?

> "An act of Parliament shall not change the law of nature, and therefore if an act says that a man shall be a judge in his own cause, it shall be void." (Com. Digest, Parliament K.)

It is respectfully submitted that the order of the District Court should be reversed and the appellant discharged.

Respectfully submitted,

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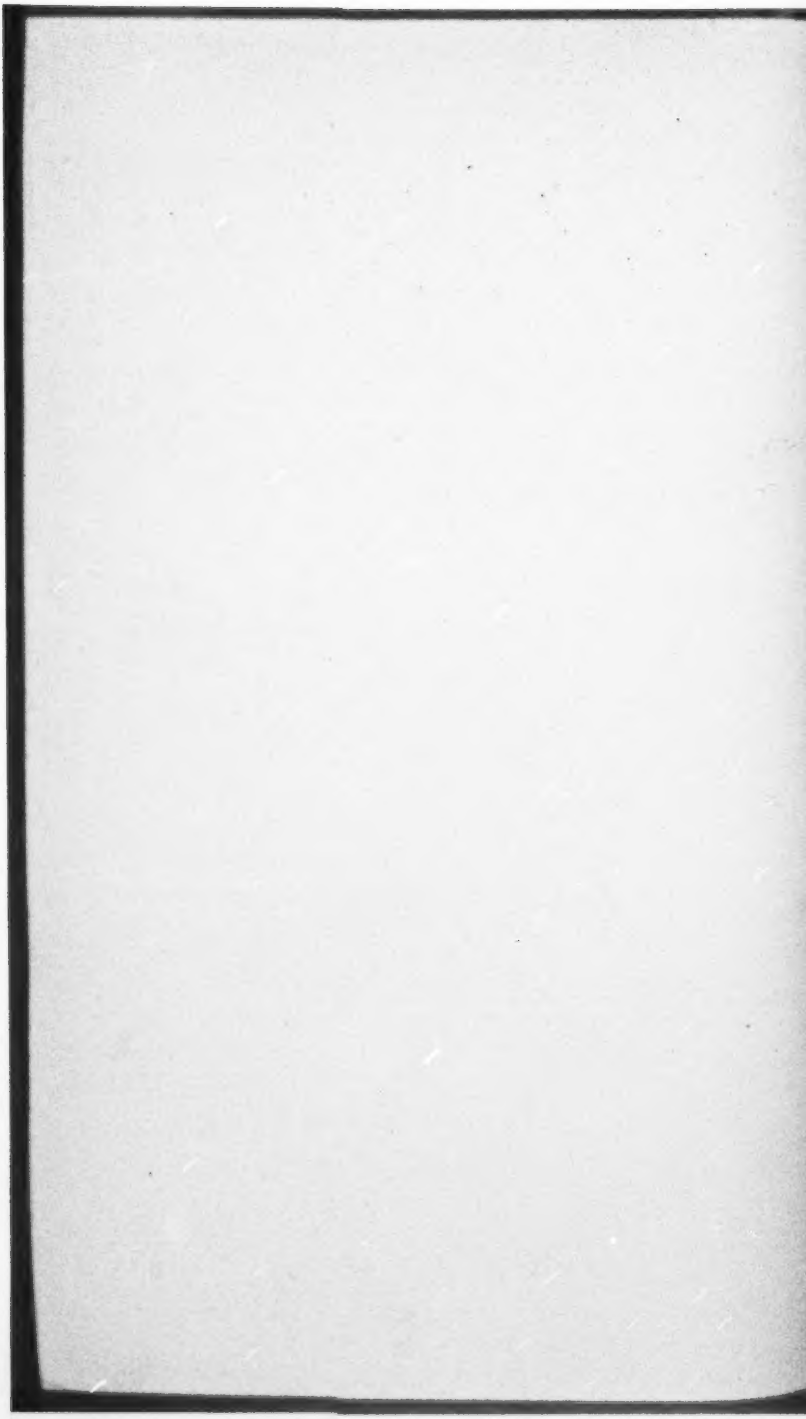

To be argued by
D-CADY HERRICK
and
MARTIN W. LITTLETON.

SUPREME COURT OF THE UNITED STATES.

H. SNOWDEN MARSHALL,
Appellant,
against
ROBERT B. GORDON, as Sergeant-at-Arms of the House of Representatives of the United States,
Appellee.

BRIEF FOR APPELLEE.

This is an appeal from an order of the District Court of the United States for the Southern District of New York, dismissing a writ of *habeas corpus* obtained by the appellant seeking his discharge from imprisonment and arrest by the appellee, Robert B. Gordon, as sergeant-at-arms of the House of Representatives of the United States, made by him in pursuance of a warrant signed by the Speaker of the House of Representatives directing the said Gordon as sergeant-at-arms to take the appellant into custody and bring him to the bar of said House to answer certain charges made against him for contempt of the said House of Representatives.

Upon the service of said writ of *habeas corpus* upon the appellee, Robert B. Gordon, he made return thereto, which return was not traversed by the appellant, and, consequently the facts therein stated must be taken as true.

The essential facts in this case are few and may be briefly stated.

Facts.

The appellant, Marshall, is, and has, for some time been, United States District Attorney for the Southern District of New York, and as such he was from September until the last of December, 1915, by himself and through his assistants, conducting an investigation before the grand jury of alleged violations of the Sherman Act, and of the activities of the Labor's National Peace Party, of which Mr. Buchanan was a member. (Page 94 of Record.)

While such investigation was in progress before the grand jury, and on the 14th day of December, 1915, while the House of Representatives was in session, the Hon. Frank Buchanan, a representative in Congress and a member of said House, upon the floor of the House, impeached the appellant, H. Snowden Marshall, charging him with the commission of certain alleged high crimes and misdemeanors, and the said matter was referred by the House to the Committee on the Judiciary. (Fol. 18 of Record.)

Thereafter and on the 28th day of December, 1915, the grand jury in the United States District Court for the Southern District of New York returned an indictment against the said Frank Buchanan and others charging them with conspiring to violate the provisions of the Sherman Anti-Trust Law. (Fol. 18 of Record.).

On the 12th day of January, 1916, Mr. Buchanan, member of the House of Representatives as aforesaid, offered a resolution in the House of Representatives, which was adopted, directing the Committee on the Judiciary to inquire into and report in regard to the action of the appellant, H. Snowden Marshall, in regard to certain matters therein set forth constituting a variety of charges against the said appellant for misconduct in his said office of United States District Attorney.

The said committee was thereby authorized to send for persons and papers, administer oaths, take testimony in regard to all the charges which, in the opinion of the committee, constitute impeachable charges, and it was also authorized to appoint a sub-committee to act for and in behalf of the whole committee, whenever and wherever it may be deemed advisable to take testimony for the use of the said committee, and that said sub-committee while so employed should have the same powers in respect to taking testimony as was

given to the said Committee on the Judiciary, and the sergeant-at-Arms by himself or deputy should serve process for said committee or sub-committee. (Fols. 19-27 of Record.)

The above-named resolution was referred to the Committee on the Judiciary of the House of Representatives, and it thereafter began the consideration of said resolution, and proceeded to act thereon. (Fol. 28 of Record.)

Thereafter and on the 27th day of January, 1916, the chairman of the Committee on the Judiciary of the House of Representatives offered a resolution in the House of Representatives, which was agreed to, and which, among other things, authorized the Committee on the Judiciary to appoint a sub-committee to act for and in behalf of the whole committee, wherever it might be deemed advisable to take testimony for said committee. In case such sub-committee is appointed it should have the same power in respect to obtaining testimony as was therein given to the Committee on the Judiciary, and a sergeant-at-arms by himself or deputy who should attend the sitting of the sub-committee, and serve process of the same. (Fols. 29-31 of Record.)

That thereafter the Committee on the Judiciary of the House of Representatives on the 31st day of January, 1916, at the regular session of the committee, made an order directing that the chairman of the Committee on the Judiciary appoint a sub-committee of three, and that said sub-committee use its discretion as to the scope of its inquiry covering the charges under examination, and report the result of its investigation, with all evidence taken by it, to the full committee.

Thereafter the Hons. Charles C. Carlin, Warren Gard and John M. Nelson, members of the said Committee on the Judiciary, were appointed as the sub-committee of three, to further investigate for the committee, the charges against the appellant. (Fol. 32 of Record.)

After the appointment of such sub-committee, it organized and proceeded to hear testimony of witnesses, and determined that in carrying out the duties assigned to it, it should hear testimony of certain witnesses in the city of New York, and thereupon proceeded to the city of New York, and caused certain witnesses to be brought before it by subpoena in the Post-office building in the city

of New York, and continued the examination of such witnesses upon the said charges up to and including the 4th day of March, 1916. (Fol. 33 of Record.)

On the 4th day of March, 1916, the appellant wrote and caused to be transmitted to the chairman of said sub-committee of the House of Representatives, a letter, which letter constitutes the contempt of the House of Representatives referred to in the warrant issued for the arrest of the appellant, and in which warrant said letter is set forth at length. (Fols. 9 to 14, 33 of Record.)

It will be observed that the last sentence of the aforesaid letter reads as follows: "I propose to make this letter public," and it would appear that such letter was delivered to the various newspapers in New York City prior to its delivery to the chairman of the committee to whom it was addressed (pages 91-92 of Record), but not to be released for publication until after its receipt by said chairman. (Page 132 of Record.)

Thereafter the Committee on the Judiciary reported the matter of the writing, sending and publication of said letter to the House of Representatives (page 16 of Record), which report is to be found at pages 17 to 22, inclusive, of the Record.

Upon the presentation of such report a resolution was presented and adopted by the House of Representatives providing for the appointment of a select committee of five members to consider the report and statement from the Judiciary Committee with reference to the conduct of the appellant, and report to the House of Representatives the facts in the case, as to a violation of any of the privileges of the House of Representatives, or of the Committee on the Judiciary, or the sub-committee thereof, the power of the House of Representatives to punish for contempt, the procedure in contempt proceedings in case they found a contempt had been committed, to the end that the privileges of the House should be maintained and the rights of its members protected in the performance of their duties. (Fol. 42 of Record.)

Pursuant to the foregoing resolution, the Speaker of the House of Representatives appointed a select committee of five members who proceeded to consider the matters referred to. (Fol. 44 of Record.)

That the appellant upon the invitation of the committee appeared before the committee at the Capitol in Washington, admitted that he wrote the letter of March 4th, 1916, and stated that there was not a word in it which was not true and that under the same circumstances he should write the same letter again. (Fol. 44; page 103 of Record.)

Thereafter the said select committee through its chairman made its report to the House of Representatives, which report is to be found commencing at page 29 of the Record. That among other things the committee reported to the House, that they concluded and found that the letter written and published by the appellant, dated March 4th, 1916, is as a whole, and in several separate sentences was, defamatory and insulting, intending bringing the House into public contempt and ridicule, and that said H. Snowden Marshall, by writing and publishing the same is guilty of contempt of the House of Representatives of the United States because of a violation of its privilege, its honor and its dignity, and further, that H. Snowden Marshall in writing and publishing the letter is guilty of a breach of the privileges and a contempt of the House of Representatives, and should be brought to the bar of the House to answer such charge. (Fol. 45 of Record.)

That after the submission to the House of the report of the select committee and on the 20th day of June, 1916, the House of Representatives duly passed a resolution which constitutes the warrant for the arrest of the appellant, and under which he was arrested by the appellee. Among other things, the said resolution and warrant sets forth in full the letter of the appellant to the chairman of the sub-committee, and then proceeds as follows:

> "*Resolved*, That said H. Snowden Marshall in writing and publishing said letter, was guilty of a breach of the privileges and a contempt of the House of Representatives, and that said H. Snowden Marshall be furnished with a copy of this resolution and report of the select committee of the House of Representatives appointed to investigate the charges made against him in the House of Representatives."

It was further resolved, that when the appellant should be brought to the bar of the House, that the Speaker should inquire of him if he desired to be heard and to have counsel, and that if he

desired to avail himself of those privileges the same should be granted to him. (Page 27 of Record.)

Pursuant to such resolution the warrant was duly issued and signed by the Speaker of the House (fol. 54) and upon said warrant the appellant was arrested by the appellee.

Thereafter the appellant sued out a writ of *habeas corpus* in the District Court for the Southern District of New York, and the same coming on to be heard, the said writ was dismissed and it was ordered that the relator (the appellant) be retained in the custody of the court on his own recognizance until the first day of December, 1916, provided an appeal be taken on or before August 15th, 1916, and if no appeal be taken on or before that day, that he be remanded to the custody of the sergeant-at-arms on the first day of December, 1916. (Page 149 of Record.)

Thereafter an appeal was allowed to this court by United States District Judge Julius M. Mayer. (Page 151 of Record.)

Preliminary.

The question here presented is a grave and important one. It involves the power of the House of Representatives of the United States. Whether the House of Representatives, when in the performance of one of the duties devolved upon it by the Constitution, has the power to protect itself while in the discharge of such duties; whether while lawfully investigating, in order to determine what its action shall be in the premises, it is powerless to prevent its authority from being undermined, its conclusions discredited in advance, its motives impugned, its integrity challenged and its conduct held up to obliquy, and the contempt of the public; and that it must submit to the creation of a public opinion discrediting in advance any action that it may take, and tending to intimidate its members in the performance of their duty; and whether what any court of justice can do to protect itself in the discharge of its duties, the highest tribunal in the land lacks the power and authority to do.

We shall not consider what constitutes a contempt any further than to quote Blackstone as to how contempts may be committed, as follows:

> "By speaking or writing contemptuously of the court or judges, acting in their judicial capacity; by printing false

accounts (or even true ones without proper permission) of causes then pending in judgment; and by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justices are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people."

Blackstone's Com., Vol. IV, p. 286.

Of course, this statement as to how contempts may be committed against courts and judges applies to contempts committed against legislative bodies as well, if such legislative bodies have any jurisdiction to commit for contempt.

Neither shall we discuss whether within this definition of how contempts may be committed, the question as to whether the letter of Mr. Marshall, to be found at page 32 of the case, constitutes a contempt of the House of Representatives, because if the House of Representatives has the power and authority to punish for contempt, it is the sole judge of whether a contempt was thereby committed of its power, dignity and authority, and its action thereon will not be reviewed by this or any other court.

In Re Debs, 158 U. S., 564, at pp. 595-600.

What is said there as to the sole adjudication of contempts belonging exclusively to each respective court, and not being reviewable by any other, applies with still greater force, to an act of the House of Representatives acting within its jurisdiction because of its being part of one of the co-ordinate branches of the government, each of which is supreme when acting within its jurisdiction, and not reviewable by any other branch of the government.

In considering this case we have nothing to do with the merits of the charges made by Representative Buchanan, and, at the time the letter was written, under investigation by the Judiciary Committee of the House of Representatives; nor have we anything to do with the manner in which that investigation was conducted, the propriety of the proceedings of the sub-committee, or the merits of Mr. Marshall's claim in regard to their conduct towards him. It is simply a question of the power of the House of Representatives, whether it has jurisdiction in the matter, and power to punish for contempt.

POINTS.

FIRST.

The only question open for consideration upon proceedings by habeas corpus, is that of jurisdiction.

"The general rule is that the writ of *habeas corpus* will not issue unless the court, under whose warrant the petitioner is held, is without jurisdiction; and that it cannot be used to correct errors. Ex parte Watkins, 3 Pet., 197; Ex parte Parks, 93 U. S., 18; Ex parte Yarbrough, 110 U. S., 651; Ex parte Bigelow, 113 U. S., 328; In re Coy, 127 U. S., 731, 756; In re Schneider, Petitioner, 148 U. S., 162. Ordinarily the writ will not lie where there is a remedy by writ of error or appeal, In re Frederick, Petitioner, 149 U. S., 70; In re Tyler, 149 U. S., 164, 180; In re Swan, 150 U. S., 637, 648; yet in rare and exceptional cases it may be issued although such remedy exists. Ex parte Royall, 117 U. S., 241; New York v. Eno, 155 U. S., 89."

In re Chapman, 156 U. S., 211, 215.
See, also, In re Taylor, 149 U. S., 164.
Kingsley v. Anderson, 171 U. S., 101-106.

Ex parte Kearney (20 U. S., 37) was a case where a writ of *habeas corpus* was sought to discharge one John T. Kearney, who was in jail under a commitment of the Circuit Court for the District of Columbia for an alleged contempt.

Mr. Justice Story delivered the opinion and in the course of it cited the case of Brass Crosby, Lord Mayor of London (3 Wilson, 188), and said:

"It was an application to the court of common pleas for a *habeas corpus,* to bring up the body of the Lord Mayor, who was committed for contempt by the House of Commons. The *habeas corpus* was granted, and upon the return, the causes of contempt for which the party was committed, were set forth. It was argued, that the House of Commons had no authority to commit for a contempt; and if they had, that they had not used it rightly and properly, and that the causes assigned were insufficient. But the whole court were of opinion, that the House of Common had a right to commit

for a contempt; and that the court could not review its adjudication. Lord Chief Justice De Grey, on that occasion said, 'when the House of Commons adjudged anything to be a contempt, or a breach of privilege, their adjudication is a conviction, and their commitment, in consequence, is execution; and no court can discharge on bail, a person that is in execution by the judgment of any other court. The House of Commons, therefore, having an authority to commit, and that commitment being an execution, what can this court do? It can do nothing, when a person is in execution by the judgment of a court having a competent jurisdiction. In such a case, this court is not a court of appeal.' Again, 'the courts of K. B. or C. B. never discharged any person committed for a contempt, in not answering in the court of chancery, if the return was for a contempt. If the admiralty commits for a contempt, or one be taken upon *excommunicato capiendo,* this court never discharges the persons committed.' Mr. Justice Blackstone said, 'all courts, by which I mean to include the two Houses of Parliament, and the courts of Westminster Hall, can have no control in matters of contempt. The sole adjudication of contempt, and the punishment thereof, belongs exclusively, and without interfering, to each respective court. Infinite confusion and disorder would follow, if courts could, by writs of *habeas corpus,* examine and determine the contempt of others.'

"So, that it is more manifest, from the whole reasoning of the court in this case, that a writ of *habeas corpus,* was not deemed a proper remedy, where a party was committed for a contempt by a court of competent jurisdiction; and that, if granted, the court could not inquire into the sufficiency of the cause of commitment. If, therefore, we were to grant the writ in this case, it would be applying it in a manner not justified by principle or usage; and we should be bound to remand the party, unless we were prepared to abandon the whole doctrine, so reasonable, just and convenient, which has hitherto regulated this important subject. We are entirely satisfied, to administer the law as we find it, and are all of opinion, that, upon the facts of this case, the motion ought to be denied." (Pp. 42-43.)

The only question open for consideration is one of jurisdiction. If the House of Representatives had jurisdiction in the matter no court can review its action. Each department of the government, legislative, executive and judicial, is supreme when acting within

its own sphere and jurisdiction, and no other department of the government can review its action either directly or by indirection.

> "When a person under arrest applies for discharge on writ of *habeas corpus* the issue presented is whether he is unlawfully restrained of his liberty. Rev. Stat., § 752. But there is no unlawful restraint where he is held under a valid order of commitment; so that in strict logic the inquiry might extend to the legal sufficiency of the order. In view, however, of the nature of the writ and of the character of the detention under a warrant, no hard and fast rule has been announced as to how far the court will go in passing upon questions raised in *habeas corpus* proceedings. In cases which involve a conflict of jurisdiction between state and Federal authorities, or where the treaty rights and obligations of the United States are involved, and in that class of cases pointed out in Ex parte Royall, 117 U. S., 241; Ex parte Lange, 18 Wall., 163; New York v. Eno, 155 U. S., 89; In re Loney, 134 U. S., 372, the court hearing the application will carefully inquire into any matter involving the legality of the detention and remand or discharge as the facts may require. But, barring such exceptional cases, the general rule is that, on such applications, the hearing should be confined to the single questions of jurisdiction, and even that will not be decided in every case in which it is raised. For otherwise the '*habeas corpus* courts could thereby draw to themselves, in the first instance, the control of all prosecutions in state and Federal courts.'"
>
> Henry v. Henkel, 235 U. S., 219, 227-228.

So here, for the court to attempt to review the action of the House of Representatives in this matter, would be to draw to itself in the first instance the control of all proceedings relative to contempts by Congress or either of its branches.

In the case of Kilbourne v. Thompson, hereinafter considered, no attempt was made to draw into the courts, in the first instance, as here, the control of the proceedings being taken by the House of Representatives to punish the complainant, and its proceedings in that case were only passed upon by the court after the House had acted and punished the complainant for contempt, in an action brought by him to recover damages for his imprisonment, wherein the legality of the action of the House was directly challenged and brought in question.

SECOND.

Congress has the power to punish for contempts committed against it when engaged in any matter within its jurisdiction.

We shall enter into no discussion or consideration of the English authorities in relation to the power of Parliament to punish for contempts, nor as to whether the Congress of the United States, or either branch of it, can trace its powers in that respect to those exercised by the English Parliament. It would be a useless exhibition of industry, because the English cases have been fully considered in the very elaborate opinion of the court in the case of Kilbourne v. Thompson (103 U. S., 168), in the case of Nugent (12 Federal Cases, 471), and also in the opinion of Judge Hand in this case. We shall, therefore, confine our discussion to a brief consideration of what Congress has done in the past and what the courts of our own country have decided.

The power to punish for contempt was exercised by Congress from a very early period, commencing in 1795 with the case of Randall, charged with attempting to bribe members of the House of Representatives. This was followed by the case of William Duane in 1800, charged with a publication tending to defame the Senate.

See Hinds' Precedents of House of Representatives, pp. 1047-1052.
Story on Constitution, section 848.

These cases are followed by a number of others for assaults upon members, also for punishment of witnesses for refusing to answer questions propounded to them, all of which are set forth in the second and third volumes of Hind's Precedents, commencing at page 1047 of volume two.

The first case where the power and authority of Congress seems to have been brought into serious consideration by the courts was that of Anderson v. Dunn (6 Wheaton, 204).

In 1818, Anderson was brought before the House of Representatives charged with having attempted to bribe a member of the

House, he was placed in the custody of the sergeant-at-arms of the House, was tried, found guilty and sentenced to be reprimanded by the Speaker, for his alleged contempt.

Hinds' Precedents of the House of Representatives, p. 1058, et seq.

Subsequently, Anderson brought an action against Dunn, the sergeant-at-arms, for false imprisonment. Dunn justified under a warrant of the House of Representatives directed to him as sergeant-at-arms, wherein it recited that Anderson had been found by the House

> "Guilty of a breach of the privileges of the House, and of a high contempt of the dignity and authority of the same,"

and directing the sergeant-at-arms to bring him before the House. Neither the warrant nor the plea described gave any clew to the nature of the act, which was held by the House to be a contempt. The plea was demurred to by Anderson, but held good by the court.

The defense of the sergeant-at-arms rested on the broad ground that the House having found the plaintiff guilty of a contempt, and the Speaker, under the order of the House, having issued a warrant for his arrest, that alone was sufficient authority for the defendant to take him into custody, and the court held that defense good.

Portions of the opinion of the court sustaining the power of the House of Representatives to punish for contempt will be referred to later.

The next case was that of John Nugent (18 Fed. Cases, 471; Hinds' Precedents, p. 1110, et seq.). Nugent was committed for contempt for the publication of a treaty pending in executive session of the Senate; he then sued out a writ of *habeas corpus* in the Circuit Court of the District of Columbia, which dismissed the writ and remanded him to imprisonment.

The opinion of the court, amongst other things, said:

> "The jurisdiction of the Senate in cases of contempt of its authority depends upon the same grounds and reasons upon which the acknowledged jurisdiction of other judicial tribunals rests, to wit, the necessity of such a jurisdiction to

enable the Senate to exercise its high constitutional functions — a necessity at least equal to that which supports the like jurisdiction which has been exercised by all judicial tribunals and legislative assemblies in this country from its first settlement, and in England from time immemorial. That the Senate of the United States may punish contempts of its authority seemed to be admitted by the prisoner's counsel, provided it be in a case within their cognizance and jurisdiction; but whether admitted or not, such is the law as laid down by the Supreme Court of the United States in Anderson v. Dunn, 6 Wheat., 224, and in Kearney's Case, 7 Wheat., 41.

* * * * * * * * *

"These cases (cited) and authorities, we think, show conclusively that the Senate of the United States has power to punish for contempts of its authority in cases of which it has jurisdiction; that every court, including the Senate and House of Representatives, is the sole judge of its own contempts, and that in case of the commitment for contempt in such a case no other court can have a right to inquire directly into the correctness or propriety of the commitment, or to discharge the prisoner on *habeas corpus*, and that the warrant of commitment need not set forth the particular facts which constitute the alleged contempt.

* * * * * * * * *

"But it has been contended also in argument that the power of the Senate to punish for contempts is confined to their authority over their own members.

"It is true that by the Constitution, article 1, section 5, 'each House may determine the rules of its proceeding, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.' But it says nothing of contempts. These were left to the operation of the common-law principle that every court has a right to protect itself from insult and contempt, without which right of self-protection they could not discharge their high and important duties. It is not at all probable that the framers of the Constitution, by giving an express power to the Senate to punish its members for disorderly behavior, and even to expel a member, intended to deprive the Senate of that protection from insult, which they knew very well belonged to and was enjoyed by both Houses of Parliament and the legislatures of the former colonies and now states of this Union. The provision of the constitution may have been intended to remove a doubt, whether a member of the Senate, appointed

by and responsible to a state legislature, could be guilty of a contempt to a body of which he himself was a member; or it may have been intended to apply only to such disorderly behavior as did not amount to a contempt of the House; or to remove a doubt whether the Senate had power to expel a member. But whatever may have been the intention we think the provision does not justify an inference that their power to punish for contempts can be executed only upon members of the Senate."

The case of Anderson v. Dunn was supposed to have settled the law in relation to the power of Congress, or either of its branches, to punish for contempt and was followed by the courts generally in this country and by the text-writers and remained unquestioned until the case of Kilbourne v. Thompson (103 U. S., 168):

> "The case of Anderson v. Dunn, 6 Wheat., 204 (decided by the Supreme Court of the United States in 1821), declared the doctrine that representative bodies in America possessed inherently the power to punish for contempt. For sixty years following this decision, its authority remained unquestioned in this country. The repeated and unequalified declarations of this principle by courts and text-writers are to be traced to this case. Mourice v. Dyer, 2 Greene, 165; Yates v. Lansing, 9 Johns., 395; c. c., 6 Am. Dec., 290; 1 Burr's Trial, 352; United States v. Hudson, 7 Cranch, 32; 1 Kent Com., 300; United States v. New Bedford Bridge, 1 W. & M., 401; Tenney's Case, 23 N. H., 162; State v. Copp, 15 N. H., 212."
>
> Ex parte Dalton, 44 Ohio St., 142.

Mr. Justice Story, in his commentaries upon the Constitution, considered the power of Congress to punish for contempt and said:

> "This subject has of late undergone a great deal of discussion both in England and America, and has finally received the adjudication of the highest judicial tribunals in each country. In each country, upon the fullest consideration, the result was the same, namely, that the power did exist, and that the legislative body was the proper and exclusive forum to decide when the contempt existed, and when there was a breach of its privileges; and that the power to punish followed, as a necessary incident to the power to take cognizance of the offense."
>
> Section 847, pp. 614-615.

He also quotes with approval the language of Rawle on the Constitution upon the same subject, as follows:

> "It would be inconsistent with the nature of such a body to deny it the power of protecting itself from injury or insult. If its deliberations are not perfectly free, its constituents are eventually injured. This power has never been denied in any country, and is incidental to the nature of all legislative bodies. If it possesses such a power in the case of an immediate insult or disturbance, preventing the exercise of its ordinary functions, it is impossible to deny it in other cases which, although less immediate or violent, partake of the same character by having a tendency to impair the firm and honest discharge of public duties." § 846.
>
> Rawle on Constitution, chapter 4, page 48.

Hare, in his valuable treatise upon the Constitution, says:

> "'The president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors,' 'The House of Representatives shall have the sole power to impeach,' and the Senate 'to try all impeachments.' 'When sitting for that purpose they shall be on oath or affirmation.' These are important and far-reaching powers, which cannot be effectually exercised without the compulsory attendance of witnesses, the production of papers, and the maintenance of order,— in short, all that is essential to the discharge of the judicial function, including the arrest, conviction, and imprisonment of persons who disturb the proceedings or disobey any lawful command while they are going on.
>
> "Although these last-named powers are not expressly given, they are a necessary means for the exercise of the express powers, without which either House might be harassed by a series of premediated insults that could not be effectually punished in the ordinary course of justice, and compelled to exclude the public or tolerate indignities which would lower them in the eyes of the nation and hinder the deliberate and orderly consideration of the questions under debate. So much was decided in Dunn v. Anderson, where the court also held that the House of Representatives is, like the House of Commons, entitled to the benefit of the presumption, which shields courts of justice, that all has been rightly done unless the contrary appears. A Magistrate's warrant must set forth

some sufficient cause; but this rule does not apply to the writs of superior courts, or of either branch of Parliament. Such was the view taken at the outset of the government, and prevailing until recently. In the language of Chief Justice Shippen, as cited by Story, 'the members of the legislature are legally and inherently possessed of all such privileges as are necessary to enable them to execute the great trust reposed in them by the people. Assaults on members, attempts to corrupt them, sending challenges to members, and libellous publications reflecting on the Senate have been treated as contempt, and visited in some instances with imprisonment, in others with a reprimand on submission made.'"

Hare's Am. Cons. Law, Vol. 2, pp. 850-851.

The case of Kilbourne v. Thompson (103 U. S., 168) is claimed to have reversed the decision in Anderson v. Dunn, and has been the principal reliance of the petitioner in this case.

It is unnecessary to recapitulate all the facts in the Kilbourne case. Suffice it to say, that he was committed for contempt in refusing to answer certain questions put to him as a witness by a committee of the House of Representatives concerning the business of a real estate partnership of which he was a member, and for refusing to produce certain books and papers in relation thereto, and was by an order of the House imprisoned in the common jail in the District of Columbia.

He brought an action to recover damages therefor against the sergeant-at-arms who executed the order and the members of the committee who caused him to be brought before the House.

This court held that the House of Representatives had no general power or authority to commit for contempt; that the warrant of the Speaker for his commitment was not conclusive and that the investigation being carried on by the House of Representatives, in the course of which, the alleged contempt was committed, was an investigation of a matter beyond the jurisdiction of the House, and consequently that there was no authority in either House to compel a witness to testify as to the subject under investigation.

The opinion in that case contains many things which are *obiter*, but owing to the great learning and ability of the justice who delivered it, and the fact that it was acquiesced in by the other members of the court, great weight is to be given to the discussion in-

dulged in. The opinion considers at length the decisions of the English courts in relation to the powers of the House of Commons to commit for contempt and traces its jurisdiction in that respect to the judicial power possessed by the High Court of Parliament when it was composed of the Bishops, Lords, Knights and Burgesses, who met in one body, and that upon the separation into two separate bodies, the Lords and Commons holding their sessions in different chambers, the Commons retained some portion of the judicial power formerly vested in the High Court of Parliament.

The opinion then holds that the powers and privileges of the House of Commons in England on the subject of punishment for contempt rests upon principles which have no application to the House of Representatives of the United States. That under our form of government the judicial department and the legislative department are entirely separate and distinct; that all the judicial powers of government are vested in the courts, with the exception that the Constitution authorizes each House to punish its own members, to expel a member by a vote of two-thirds, and is authorized to compel the attendance of absent members in such manner and under such penalties as each House may provide; each House is made the judge of the qualifications and elections of its members, and that the House of Representatives has the sole right to impeach the officers of the government and the Senate to try them. As to this latter power the opinion says:

> "The Senate also exercises the judicial power of trying impeachment, and the House of preferring articles of impeachment." (P. 191.)

And that

> "Where the question of such impeachment is pending before either Body acting within its appropriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses and their answer to proper questions in the same manner and by the use of the same means that courts of justice can in like case." (P. 190.)

The investigation that was being conducted in the Kilbourne case was one where it was claimed that the government was the creditor of Jay Cook & Co., which company was then in bankruptcy

in the District Court of the United States, and the preamble to the resolution providing for the investigation recited that the indebtedness resulted from the improvidence of the Secretary of the Navy. After reciting these facts, the opinion goes on to say:

> "If, * * * any purpose had been avowed to impeach the secretary, the whole aspect of the case would have been changed." (P. 193.)

Thus clearly indicating that if it had been an impeachment proceeding Kilbourne could have been properly punished for contempt for refusing to answer the questions put to him as a witness before the committee conducting such investigation.

As to whether the power to punish for contempts exists as one necessary to enable either House of Congress to exercise successfully their function of legislation, the court expressly declined to decide, because it was able to decide the case without passing upon the existence or non-existence of such power in aid of the legislative functions. (Page 189.)

In short all that the case of Kilbourne v. Thompson really decided was, that the House of Representatives had no power to punish a witness for contempt in refusing to answer in a proceeding that the House of Representatives had no power or authority to conduct.

The case of the Interstate Commerce Commission v. Brimson (154 U. S., 447, at page 485), recognizes the existence of the power of either House of Congress to punish disorderly behavior upon the part of its members, to compel the attendance of witnesses, and the production of papers in election and impeachment cases and any case that may involve the existence of those bodies. Citing the cases of Anderson v. Dunn and Kilbourne v. Thompson.

In the case of Chapman (166 U. S., 661), Chapman was indicted and convicted under a statute of the United States which provided that:

> "Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question

under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 and not less than $100, and imprisonment in the common jail for not less than one month nor more than twelve months."

Chapman having been committed to the custody of the United States marshal for the District of Columbia, sued out a writ of *habeas corpus,* and it was claimed that the statute was unconstitutional upon various grounds, among others:

"That the law delegates to the District of Columbia Criminal Court the exclusive jurisdiction and power to punish as contempt the acts denounced, and thus deprives the Houses of Congress of their constitutional function in the particular class of cases." (P. 671.)

It was also contended:

"That if the law should be interpreted as leaving in the Houses the power to punish such acts, and vesting in addition jurisdiction in the District Criminal Court to punish the same acts as misdemeanors, then the law is invalid because subjecting recalcitrant witnesses to be twice put in jeopardy for the same offense contrary to the fifth amendment." (P. 671.)

The opinion of the court, amongst other things, said:

"Under the Constitution the Senate of the United States has the power to try impeachments; to judge of the elections, returns and qualifications of its own members; to determine the rules of its proceedings, punish its members for disorderly behavior and, with the concurrence of two-thirds, expel a member; *and it necessarily possesses the inherent power of self-protection.*" (P. 668.)

"The refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the Senate, of course, constitutes a contempt of that Body and by the statute this is also made an offense against the United States." (P. 671.)

As to the contention that the statute was unconstitutional, as depriving the Houses of Congress of their constitutional functions, the court said:

"We grant that Congress could not divest itself, or either of its Houses, *of the essential and inherent power to punish*

for contempt, in cases to which the power of either House properly extended; but, because Congress, by the act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved; and the statute is not open to objection on that account.

"Nevertheless, although the power to punish for contempt still remains in each House, we must decline to decide that this law is invalid because it provides that contumacy in a witness called to testify in a matter properly under consideration by either House, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States, who are interested that the authority of neither of their departments, nor of any branch thereof, shall be defied and set at naught. * * * Indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuitu* and capable of standing together." (Citing cases.) (Pp. 671-672.)

From this review it will be seen that commencing five years after the final ratification of the Constitution (Final Ratification, 1790, Story Cons., Section 279; Randall Case, 795 *supra*), Congress has repeatedly exercised the power to punish for contempt, and that this court has uniformly recognized the existence of such a power in Congress. The only limitations placed upon it by any decision of this court being in the case of Kilbourne v. Thompson, holding that Congress cannot exercise that power when the alleged contempt occurs when Congress is proceeding in a matter over which it has no jurisdiction, and also seemingly holding that punishing for contempt is the exercise of a judicial power; and that Congress has no general judicial power, and, therefore, no general power of punishing for contempt, at the same time recognizing that Congress has, in exceptional cases, as in the case of preferring articles of impeachment by the House of Representatives, and the trial thereof by the Senate, judicial powers, and it would seem to follow that when conducting such proceedings it has the power to punish for contempt of its authority.

B.

IF THE HOUSE OF REPRESENTATIVES, THROUGH ITS COMMITTEE, WAS ENGAGED IN A JUDICIAL PROCEEDING AT THE TIME OF THE COMMISSION OF THE ALLEGED CONTEMPT, THEN WITHIN THE REASONING OF THE CASE OF KILBOURNE V. THOMPSON, THE HOUSE HAD POWER AND JURISDICTION TO PUNISH FOR CONTEMPT.

As we have seen the House, through its Committee, was considering charges made by a member of its body, upon the floor of the House, alleging that the relator had committed impeachable offenses, and impeaching him therefor, and such Committee was engaged in taking evidence in relation to such charges and offenses.

That impeachments are judicial proceedings would seem to be unquestioned.

> "An impeachment is described by the law of England to be a presentment to the most high and supreme court of criminal jurisdiction by the most grand inquest of the Kingdom."
>
> Wilson's Works, Vol. 2, p. 45; Citing 2 Hale, P. C., 150; 4 Blackstone Cons., 256.

The Kilbourne case recognizes the fact that impeachments are judicial proceedings, when it states that when a question of impeachment is pending before either body of Congress:

> "We see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by use of the same means that courts of justice can in like case." (P. 190.)

And again:

> "The Senate also exercises the *judicial* power of trying impeachments and the House of preferring articles of impeachment." (P. 191.)

After referring to the opinion in the Kilbourne case, Hare in his work on American Constitutional Law, in relation to that decision, said:

> "But it would at the same time appear that as the Lower House is endowed with *judicial powers of impeachment,*

> and may do all that is requisite for its effectual exercise, it is necessarily empowered to act as an inquest in preparing the articles which take the place of an indictment, and may issue subpoenas and punish any one who is in contempt by refusing to appear." (P. 855.)

It must be conceded, we think, that the investigation in this case by the sub-committee and by the full committee was a proceeding upon impeachment, and it follows therefrom that everything from the time the articles were presented by the member upon the floor of Congress, referred to the Judiciary Committee and then for special investigation to the sub-committee thereof, were all proceedings upon impeachment, and judicial in their nature.

The case of People v. Hackley (24 N. Y., 74) was one where Hackley had refused to answer certain questions before a grand jury, for which he was adjudged guilty of criminal contempt. Under a statute of the State, courts of record were empowered to punish by fine and imprisonment, any misconduct by persons summoned as witnesses, for refusing to be sworn or to answer as such witnesses. That provision of the statute by another statute was declared to extend to trials and other proceedings on indictments, so far as they may be in their nature, applicable thereto.

It was contended in behalf of Hackley that the examination of the witness by the grand jury was not a proceeding upon indictment, and was not within the statute. The court, in answer to that criticism, said:

> "In one sense it is not. But by the theory of proceedings in criminal cases, the indictment is supposed to be prepared and taken before the grand jury by the counsel prosecuting for the state; and the evidence is then given in respect to the offense charged in it. If the party accused appears to be guilty, the indictment is certified to be a true bill; otherwise, it is thrown out. In that view of the practice, all which takes place before the grand jury as well as the subsequent steps may be said to be proceedings upon the indictment." (P. 79.)

The House of Representatives and the Judiciary Committee acting for it and as a part of it, is as much a portion of the Court of Impeachment as a grand jury is a part of the court to which it

is attached and a publication in relation to the grand jury has been held punishable for contempt.

> "A publication need not, to constitute an interference with justice, and therefore, a contempt of court, be addressed to a court or judge. It may refer to any person who, for the time being is an essential part of the court, or who is otherwise so situated that the influences brought to bear upon him by the objectionable publication, if effective, would have amounted to an interference with, or a pollution of, the course of justice. Thus, the grand jury is an essential part of the court in matters of criminal prosecution; and the writing to them of a letter reflecting, by severe and approbrious language, upon the conduct and integrity of the jurors in connection with charges which were the subject of investigation before them, and stating that if they found an indictment thereon, the community would conclude that they had been bribed to do so, is punishable as a contempt of court. In so deciding, the supreme court of California, said: 'The letter was neither written nor sent for the purpose of informing the grand jury of evidence which would explain away the charges under investigation against the petitioner's client. It was aimless for any purpose, except to exasperate the jurors by the aspersions upon their official conduct which it contained, or to deter them from performing their duties by the threats of a public clamor which it expressed, or to create a distrust and want of confidence in any action which might be taken as the result of their investigation, and thus to embarrass the court itself in the administration of justice. That such a communication to a jury sitting in, or in connection with a court, of which it is a component part, and while engaged in the exercise of its functions, is a punishable contempt of court does not admit of doubt. 'Any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning the merits, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, or the witnesses, or the counsel, may be visited as a contempt;' Bishop's Criminal Law, § 216. 'It would be strange if, under a government of law, it were otherwise;' In re Tyler, 64 California, 434."
>
> Percival v. The State, 50 American State Reports, Note, 575.

The principal elements of a judicial proceeding are here presented. The complainant, the one who preferred the charge upon

the floor of the House of Representatives; the defendant, the person charged; a body to pass upon the complaint so made, hear the parties, take the evidence of witnesses, pass upon their testimony, and determine whether it is sufficient to place the defendant upon trial; every element of a trial in a court of justice except the power to render final judgment. The same power as that possessed by a committing magistrate, or a grand jury; the power to hear complaints, pass upon the testimony of witnesses, and determine whether the party charged shall be discharged, or be committed, or indicted, to stand trial.

It seems to be conceded by all the authorities, and, we think, will not be disputed here, that in a proceeding in a matter over which the House of Representatives has jurisdiction, it has the power to subpoena witnesses and punish them for contempt for not appearing, or if appearing, for not answering.

If simply not to obey the subpoena or, obeying, to refuse to testify, constitutes a contempt, it would seem to be a much greater contempt and a greater reflection upon the power, dignity and integrity of the House of Representatives to write and cause to be published letters attacking the honesty of the motives and integrity of the House of Representatives; to be a matter much more likely to discredit Congress, and bring it into contempt, than merely disobeying its subpoena; to be, in short, a demonstration of, to use the words of Blackstone:

> "A gross want of that regard and respect which, when once courts of justice (legislative bodies) are deprived of, their authority (so necessary for the good order of the Kingdom) is entirely lost among the people."

Defiance of its power is much less dangerous and contemptuous than the publication of charges of dishonesty.

If the power to punish for contempt exists at all, it must exist for all kinds of contempts, and once conceded, it is not divisible; having jurisdiction in the premises, Congress itself, or the House of Representatives, is to determine whether or not a contempt against it has been committed, and the courts will not interfere to say that it can punish for one kind of contempt and not for another.

THIRD.

The House of Representatives has jurisdiction to punish for contempt, as an exercise of power necessary to enable it to fully exercise the powers expressly conferred.

Article 1 of the Constitution of the United States sets forth a number of powers expressly granted to Congress, and subdivision *18*, section *8*, of said article, in addition, grants to Congress the power

> "To make all laws which shall be *necessary* and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

The powers thus conferred are legislative powers, but in addition, we understand it to be fundamental law that each department of the government possesses not only the powers expressly conferred, but, in addition, by implication, in the absence of any express limitations thereon, those necessary to enable it to discharge the obligations, perform the duties and exercise the powers expressly imposed and conferred upon it.

What then are the necessary powers that flow by implication from those expressly granted; are they only those that are indispensable, and without which it cannot give effect to, or exercise, the specific powers conferred?

We can best answer that by seeing what interpretation has been given to the words *necessary* and *proper* in subdivision *18*, section *8*, of article *1* of the Constitution.

In United States v. Fisher (6 U. S., 358), at page 396, Chief Justice Marshall said in relation to subdivision *18*, section *8*, of article *1* of the United States Constitution, that

> "In construing this clause, it would be incorrect, and would produce endless difficulties if the opinion should be maintained, that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said, with respect to each, that it was not necessary, because

the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution."

Again, in the case of McCulloch v. Maryland (17 U. S., 316), Chief Justice Marshall gave the interpretation to subdivision 18, which has ever since been followed.

It had been there contended that Congress had only those implied powers which were absolutely necessary to carry into effect the powers expressly granted, and the Chief Justice said (p. 413) in relation to that argument:

> "But the argument on which most reliance is placed, is drawn from that peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be 'necessary and proper' for carrying them into execution. The word 'necessary' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to congress, in each case, that only which is most direct and simple.
>
> "Is it true, that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be under-

stood in a more mitigated sense — in that sense which common usage justified. The word 'necessary' is of this description. It has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. The comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying 'imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws,' with that which authorizes Congress 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the general government, without feeling a conviction, that the convention understood itself to change materially the meaning of the word 'necessary,' by prefixing the word 'absolutely.' This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view."

The learned judge further said (p. 421):

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

In the Legal Tender Cases (79 U. S., 457, at page 583), the court said, in reference to the same clause of the Constitution:

"It was, however, in McCulloch v. Maryland that the fullest consideration was given to this clause of the Constitution granting auxiliary powers, and a construction adopted that has ever since been accepted as determining its true meaning. We shall not now go over the ground there trodden. It is familiar to the legal profession, and, indeed, to the whole country. Suffice it to say, in that case it was finally settled that in the gift by the Constitution to Congress of authority to enact laws 'necessary and proper' for the execution of all the powers created by it, the necessity spoken of is not to be understood as an absolute one. On the contrary,

this court then held that the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people."

In the same case the court also said:

"That would appear * * * to be a most unreasonable construction of the Constitution which denies to the government created by it, the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfillment of its acknowledged duties. Such a right, we hold, was given by the last clause of the eighth section of its first article. The means or instrumentalities referred to in that clause, and authorized, are not enumerated or defined. In the nature of things enumeration and specification were impossible. But they were left to the discretion of Congress, subject only to the restrictions that they be not prohibited, and be necessary and proper for carrying into execution the enumerated powers given to Congress, and all other powers vested in the government of the United States, or in any department or officer thereof."

In United States v. Gettysburg Electric Ry. (160 U. S., 668) the court, after enumerating some of the powers expressly conferred upon Congress, said, at page 681:

"Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid."

Within these interpretations of the meaning of the word "necessary" is the power to punish for contempt, a power necessary to enable Congress to perform the functions allotted to it by the Constitution, and does it tend to enhance the respect of the citizen for the law-making power of the government.

In a government like ours, it is of the utmost importance that the people should respect the laws and authorities and have confidence in their courts and legislative bodies, and anything that is done to bring the law, those who make, or those who interpret and enforce the law, into contempt, lessens the respect of the people for, and causes them to lose confidence in, our form of government.

The people cannot be expected to have respect for the laws when they have lost respect for those who make, interpret or enforce them.

In passing upon legislative matters, in determining whether they will favor or oppose the passage of any proposed act of legislation, the members of both Houses of Congress should be free from any assaults upon their integrity or of the honesty of their motives in favoring or opposing such proposed legislation and not coerced by aspersions upon their motives or upon their integrity in doing that which their free and unbiased judgment tells them should be their proper course of action.

So in determining whether a public official should be impeached, the House of Representatives should act with cool, unbiased judgment, fearlessly and impartially. It should not be disturbed by public clamor or abuse, nor influenced to prefer or not to prefer articles, by imputations upon their motives.

In acting upon proposed legislation, or determining as to whether a public official should be impeached, the members of Congress should be as undisturbed and uninfluenced in their deliberations, as should courts of justice, and it is just as necessary that they have the same means of protecting themselves from disturbing influences in their deliberations as have our courts.

It is human nature to have more respect for the person who can protect himself, and who personally resents an insult offered to him, than for one lacking the power of self-protection and who relies upon others to protect him from insults or injuries.

So it is with public officials, or public bodies, we have more respect for those who have the power to protect themselves than for those who send offenders elsewhere to be punished.

Perhaps it ought not to be so, but so it is.

Courts and legislative bodies, like individuals, must themselves resent affronts to their honor and dignity. They cannot rely upon

others to do it for them. While an individual not being permitted to take the law into his own hands, may go to the courts for redress, nevertheless, he must take action himself. So also the courts must assert their own dignity, but one court cannot with propriety go to another for redress. The judge holding the court may as a citizen do so, but the court itself cannot.

So the individual member of Congress may seek redress from the courts for libel or slander, but members of Congress collectively constituting the Senate or House of Representatives, cannot as such House of Representatives appeal to the courts, to a co-ordinate branch of the government, for redress for indignities heaped upon it, or charges made against its honor and integrity.

That power to protect Congress, and both of its branches, from assaults upon the integrity of its motives, and upon its dignity and honor; assaults calculated to lessen the respect of the people for it, to improperly influence, if not coerce, by improper means and methods, the judgment of its members, must be lodged somewhere, would seem to be unquestioned.

The necessity for courts and legislative bodies to possess the power of punishing for contempt, and the objection thereto that such power is subject to abuse, was considered by the Court of Errors of the State of New York, and by the Supreme Court of the United States.

In the Court of Errors in the case of Yates v. Lansing (9 Johns., 385, at page 416), as follows:

> "The right of punishing for contempt by summary conviction, is inherent in all courts of justice, *and legislative assemblies,* and is essential for their protection and existence. It is a branch of the common law adopted and sanctioned by our State Constitution. The discretion involved in this power is, in a great measure, arbitrary and undefinable; and yet the experience of ages has demonstrated that it is perfectly compatible with civil liberty, and auxiliary to the purest ends of justice.
>
> "The known existence of such a power prevents, in a thousand instances, the necessity of exercising it; and its obvious liability to abuse, is, perhaps, a strong reason why it is so seldom abused.

"This power extends not only to acts which directly and openly insult, or resist the power of the court; or the persons of the judges, but to consequential, indirect and constructive contempts, which obstruct the process, degrade the authority, or contaminate the purity of the court. (4 Bl. Com., 280; 2 Hawk, bk. 2, ch. 22; 1 Com. Dig. Attachment A.)

* * * * * * * * *

"A contempt is an offense against the court, as an organ of public justice; and the court can rightfully punish it on summary conviction, whether the same act be punishable as a crime or misdemeanor, on indictment, or not. To challenge a Senator or a judge, may, under circumstances, be a contempt, but is certainly indictable. A conviction on indictment will not purge the contempt, nor will a conviction for a contempt be a bar to an indictment. The offense may be double; and so are the remedy and the punishment. For instance, assaults in the presence of the court, ressons, extortion, libels upon the court or its suitors relating to suits pending, forging a writ, &c., are indictable offenses; and certainly they are also contempts.

"Contempts are never merged in statute offenses, without express words for that purpose."

In the case of Anderson v. Dunn (19 U. S., 204), in answer to the contention that there was no such power, the court said:

"But it is contended, that if this power in the House of Representatives is to be asserted on the plea of necessity, the ground is too broad, and the result too indefinite; that the executive, and every co-ordinate, and even subordinate, branch of the government, may resort to the same justification, and the whole assume to themselves, in the exercise of this power, the most tyrannical licentiousness. This is, unquestionably, an evil to be guarded against, and if the doctrine may be pushed to that extent, it must be a bad doctrine, and is justly denounced. But what is the alternative? The argument obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption, that rudeness, caprice, or even conspiracy, may meditate against it. This result is fraught with too much absurdity, not to bring into doubt the soundness of any argument from which it is derived. That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great

> nation; whose deliberations are required, by public opinion, to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested." (Pp. 226-228.)

This court has held that the Senate "necessarily possesses the inherent power of self-protection."

Chapman Case (*supra*), 668.

Of course, the House of Representatives in that respect possesses the same power as the Senate. What is that inherent power of self-protection, and protection against what? The power simply to protect by physical force, against physical acts, as assaults upon its members, or mob violence, or does it include protection against assaults more dangerous, more destructive of their power and influence, more destructive of the respect of the people for them than merely physical assaults? How shall that inherent power be exercised?

Undoubtedly, Congress can pass laws making the refusal to obey subpoenas issued from either branch of Congress, for assaults upon its members, for words spoken in debate, and other things of like character, crimes and punishable as such.

> "(NOTE. But making these offenses crimes, is in aid of, and supplemental to, and not as a substitute for, the power of Congress to punish for contempt. One is an offense against the people, against the government of the United States as such, the other is an offense against Congress. One does not merge in the other. In re Chapman, *supra*, p. 672; Yates v. Lansing, 9 Johns. Rep., 395-416.)

But that Congress should pass a law for punishing its contempts, as such, by the courts, and thus subject itself to have its motives inquired into, and the truth and falsity of the charges made against it, investigated and passed upon by a co-ordinate branch of the government, and that one co-ordinate branch of the government should go as a suppliant to another co-ordinate branch of the government for protection against assaults upon its honor and dignity, is unthinkable.

If to punish for contempt is a judicial proceeding, then Congress cannot by a law confer upon itself or either of its branches, power to punish, for all judicial power is vested in the courts with the exception of the power to try its own members and to impeach and try public officials.

Congress has only such powers as are expressly conferred upon it by the Constitution or by necessary implication, and if it has not the power to punish for contempt so conferred, it cannot by legislation confer it upon itself or either of its branches. It cannot increase its powers beyond those granted by the Constitution either expressly or by implication. It cannot do by indirection what it cannot do directly.

This court has said:

> "We cannot assent to any view of the constitution that concedes the power of Congress to accomplish a named result, indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result, directly, and by a different proceeding judicial in form. We could not do so without denying to Congress the broad discretion with which it is invested by the constitution of employing all or any of the means that are appropriate or plainly adapted to an end which it has unquestioned power to accomplish."
>
> Interstate Commerce Com. v. Brimson, 154 U. S., 447-86.

For Congress, or either branch of it, when acting within its jurisdiction, to itself summarily punish those guilty of contempt, is to proceed by direction and not by indirection, to a legitimate end by means not prohibited by the Constitution (McCulloch v. Maryland, *supra*, p. 421), and by a method peculiarly appropriate and plainly adapted to its protection, enabling it to conduct its proceedings fearlessly and impartially, uninfluenced, and uncoerced, by any aspersions upon the integrity of its actions, or charges against the purity of its motives, in approving or opposing proposed legislation, or in conducting investigations into matters within its province and jurisdiction.

It is just as important that the law-making branch of the government should have the respect and confidence of the people,

as it is that that branch of the government which interprets and enforces the law should have that confidence and respect.

Loss of confidence in the power that makes the law is just as injurious as loss of confidence in the power that interprets the law.

When a high public official charged with the duty of enforcing respect for and obedience to the law, and of bringing to punishment those who violate it, impugns the motives and integrity of the law-making body, it is a matter of grave public concern, a matter well calculated to bring that body into contempt, and cause the people to lose confidence, and when the people lose confidence in those they have selected to make their laws and rule over them, it is the beginning of the end of government by the people.

FOURTH.

The decision of the District Court dismissing the writ of habeas corpus should be affirmed, because the contempt was committed against the House of Representatives when it was exercising a judicial function expressly conferred upon it by the Constitution, and because the commitment for contempt was in pursuance of a power exercised by each House of Congress almost from the beginning of constitutional government, and because of its being an exercise of a power necessary to enable it to carry into effect the specific functions conferred upon it by the Constitution, and also because it was in the exercise of a power necessary for the protection of its dignity and honor and for the maintenance of the respect and confidence of the people.

Respectfully submitted,

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MARSHALL *v.* GORDON, SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 606. Argued December 11, 12, 1916.—Decided April 23, 1917.

Appellant, while United States Attorney for the Southern District of New York, conducted a grand jury investigation which led to the indictment of a member of the House of Representatives. Acting on charges of misfeasance and nonfeasance made by the member against appellant in part before the indictment and renewed with additions afterward, the House by resolution directed its Judiciary Committee to make inquiry and report concerning appellant's liability to impeachment. Such inquiry being in progress through a sub-committee, appellant addressed to the sub-committee's chairman and gave to the press a letter, charging the sub-committee with

an endeavor to probe into and frustrate the action of the grand jury, and couched in terms calculated to arouse the indignation of the members of that committee and those of the House generally. Thereafter, appellant was arrested in New York by the sergeant-at-arms pursuant to a resolution of the House whereby the letter was characterized as defamatory and insulting and as tending to bring that body into public contempt and ridicule, and whereby appellant in writing and publishing such letter was adjudged to be in contempt of the House in violating its privileges, honor and dignity. He applied for *habeas corpus*.

Held: (1) That the proceedings concerning which the alleged contempt was committed were not impeachment proceedings.

(2) That, whether they were impeachment proceedings or not, the House was without power by its own action, as distinct from such action as might be taken under criminal laws, to arrest or punish for such acts as were committed by appellant.

No express power to punish for contempt was granted to the House of Representatives save the power to deal with contempts committed by its own members. Constitution, Art. I, § 5.

The possession by Congress of the commingled legislative and judicial authority to punish for contempts which was exerted by the House of Commons is at variance with the view and tendency existing in this country when the Constitution was adopted, as evidenced by the manner in which the subject was treated in many state constitutions, beginning at or about that time and continuing thereafter.

Such commingling of powers would be destructive of the basic constitutional distinction between legislative, executive and judicial power, and repugnant to limitations which the Constitution fixes expressly; hence there is no warrant whatever for implying such a dual power in aid of other powers expressly granted to Congress.

The House has implied power to deal directly with contempt so far as is necessary to preserve and exercise the legislative authority expressly granted.

Being, however, a power of self-preservation, a means and not an end, the power does not extend to infliction of punishment, as such; it is a power to prevent acts which in and of themselves, inherently, prevent or obstruct the discharge of legislative duty and to compel the doing of those things which are essential to the performance of the legislative functions.

As pointed out in *Anderson* v. *Dunn*, 6 Wheat. 204, this implied power, in its exercise, is limited to imprisonment during the session of the body affected by the contempt.

The authority does not cease when the act complained of has been committed, but includes the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence, i. e., the continued existence of the interference or obstruction to the exercise of legislative power.

In such case, unless there be manifest an absolute disregard of discretion, and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference.

The power is the same in quantity and quality whether exerted on behalf of the impeachment powers or of the others to which it is ancillary.

The legislative power to provide by criminal laws for the prosecution and punishment of wrongful acts—not here involved.

THE case is stated in the opinion.

Mr. Charles P. Spooner and *Mr. Jesse C. Adkins*, with whom *Mr. John C. Spooner* was on the brief, for appellant:

No express power is given by the Constitution to the House of Representatives to punish for contempt; the House has no general power to punish any act as a crime. Constitution, Art. I, § 5; *Kilbourn* v. *Thompson*, 103 U. S. 168, 182.

A contempt proceeding is either civil or criminal. *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418, 441; *Gompers* v. *United States*, 233 U. S. 604, 610. A civil proceeding is merely process and may be enforced by the House of Representatives when necessary to the performance of its functions. A criminal contempt proceeding is punishment for crime and may be exercised only by the judiciary. Constitution, Art. III, §§ 1, 2; Amendments V, VI. The Continental Congress suffered many indignities, 5 Elliott's Debates, 2d ed.; pp. 92–94; 1 Curtis Const. Hist., p. 149; 1 McMaster's History of U. S., pp. 133, 183; but the States were jealous of the powers of the Federal Government, 1 Curtis Const. Hist., pp. 153, 154, 159. Congress was given ample power of self-protection by exclu-

sive jurisdiction over the District of Columbia, and power to pass all necessary laws to carry into execution express powers. Constitution, Art. I, § 8, cl. 17, 18; Federalist, No. 42; 2 Story Const., § 1218; 1 Curtis Const. Hist., p. 487; 1 Tucker Const., § 205.

The power to punish for contempt is not impliedly conferred on Congress, either by analogy to the House of Commons or by necessity. While the House of Commons has such a power, it was derived from the fact that Parliament was originally a court. The House of Representatives was never a court, and does not derive this power by analogy. *Kilbourn* v. *Thompson*, 103 U. S. 168, 183, 184, 188, 189; *Kielley* v. *Carson*, 4 Moore P. C. 63. Such a power is not necessary to enable it to perform its duties or to exercise the powers expressly conferred by the Constitution.

The power claimed is exceedingly broad. It might result in conflict between the judiciary and Congress, as actually happened in England. *Stockdale* v. *Hansard*, 9 Ad. & El. 1; *Sheriff of Middlesex*, 11 Ad. & El. 273. Such a power would practically destroy the freedom of the press and of public discussion, for every critic of either body of Congress or any member thereof might be imprisoned at the whim of Congress, and without trial by the courts. If Congress exercises such power, it will have little time left in which to legislate. On the other hand, Congress must have some power of self-help; the line of demarcation is logical and plain. The principle is that applicable to all grants of powers, *McCulloch* v. *Maryland*, 4 Wheat. 316; *Ex parte Yarbrough*, 110 U. S. 651, 658; and is embodied in the maxim *Quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest*, 5 Coke, 47. Congress may preserve decorum in its deliberations, compel attendance of its members, admit and expel them, and punish them for disorder. Possibly it may imprison its own members

in the execution of these duties, but compulsory attendance or expulsion would be sufficient punishment. Congress has all power, by removal from its halls and by coercive imprisonment, necessary to self-preservation, but no power to punish for crime. That is for the judiciary.

Anderson v. *Dunn*, 6 Wheat. 204, held that the House had implied power to punish for contempt. The Privy Council declined to follow it in *Kielley* v. *Carson*, *supra*. It was overruled in *Kilbourn* v. *Thompson*, 103 U. S. 168, where it was held that the Constitution conferred no express power on either House to punish for contempts, and no such right was derived by analogy to Parliament. The court declined to decide whether any such power was implied from necessity, but said that little aid for that proposition was found in the late English cases, which are quoted from approvingly. The trend of the opinion is against the existence of such power. The power sustained in *In re Chapman*, 166 U. S. 661, was that of coercion to compel testimony and was merely process. *Ib.* 8 App. Cas. D. C. 315. See also *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447.

The English cases support the proposition. *Kielley* v. *Carson*, 4 Moore P. C. 63; *Fenton* v. *Hampton*, 11 Moore P. C. 347; *Doyle* v. *Falconer*, L. R., 1 P. C. 328; *Hill* v. *Weldon*, 5 New Brunswick, 1.

Administrative tribunals perform functions closely akin to the judicial, without this power; e. g., The Interstate Commerce Commission, The Patent Office, The General Land Office.

Not all courts have the power to punish for contempt. *Rinehart* v. *Lance*, 43 N. J. L. 311; *In re Mason*, 43 Fed. Rep. 510, 515; *Queen* v. *Lefroy*, L. R., 8 Q. B. 134.

The fact that the House was investigating a charge of impeachment does not alter the case. The legislative power is of greater importance; such a distinction would be difficult of application. The House, when sitting in an

impeachment inquiry is not a court, nor has it power to punish criminal contempts by analogy to courts. Impeachment in the United States is a political and not a judicial act; its object is to remove from office, not to punish for crime; that is left to the courts. See 26 Harv. Law Rev., p. 684.

A court renders judgment, usually reviewable, and the judges may be impeached. The House charges that a man is unfit to hold office, and there is no review of its action. Judges are appointed as experts in law, and are sworn to do impartial justice; a court proceeds according to settled rules of law and upon adequate evidence; the House proceeds in its ordinary legislative capacity, and need not take evidence; its members are not selected as lawyers and take no judicial oath.

The House is not to be likened to a grand jury. The true analogy is to the prosecuting attorney; his functions are identical with those of the House; but neither is judicial.

Not every court has power to punish for contempt committed out of its presence. The King originally was personally present with the *curia regis*, and any insult to the court was an offense against the sovereign. 1 Hawk. P. C. c. 6, § 3; 4 Black. Com., pp. 121–126. It was prosecuted only by ordinary criminal procedure. *Gompers* v. *United States*, 233 U. S. 604; 3 Trans. Royal Hist. Soc., N. S., p. 147. The first summary prosecution for a contempt for libelling a court occurred in 1720, 24 L. Q. R., pp. 184, 266, article by John Charles Fox. In Pennsylvania the state courts as early as 1809 were forbidden to prosecute libel as contempt. Thomas, Constructive Contempt, p. 26.

The Act of 1831, which became § 725, Rev. Stats., and is now § 268, Judicial Code, forbids the federal courts to punish indirect contempts in a summary way. *Ex parte Poulston*, 19 Fed. Cas. 1205; *In re Daniels*, 131 Fed. Rep. 95. *Contra: United States* v. *Toledo Newspaper Co.*, 220

Fed. Rep. 458; *United States* v. *Huff*, 206 Fed. Rep. 715; *In re Independent Pub. Co.*, 228 Fed. Rep. 787.

The most strained doctrine of implied powers will not grant a power to one tribunal by analogy to another when there is grave doubt of the existence of such power in the analogous tribunal.

Mr. D-Cady Herrick, with whom *Mr. Henry M. Goldfogle* and *Mr. Martin W. Littleton* were on the brief, for appellee:

The only question open in *habeas corpus* is that of jurisdiction. *In re Chapman*, 156 U. S. 211, 215; *In re Taylor*, 149 U. S. 164; *Kingsley* v. *Anderson*, 171 U. S. 101–106; *Ex parte Kearney*, 7 Wheat. 29, 42, 43. If the House of Representatives had jurisdiction no court can review its action, and it must be treated as sole judge of the question whether the facts constituted a contempt of its power, dignity and authority. *In re Debs*, 158 U. S. 564, 595–600. Each department of the government is supreme within its own sphere and immune from intrusion by the others. See *Henry* v. *Henkel*, 235 U. S. 219, 227, 228. For the court to review the action of the House would be to draw to itself, in the first instance, the control of all proceedings relative to contempts by either branch of Congress. *Kilbourn* v. *Thompson*, 103 U. S. 168, is distinguishable in that it was an action for damages, brought after the House had acted and punished complainant for contempt, wherein the legality of its action was directly questioned.

Congress has power to punish for contempts committed against it when engaged in any matter within its jurisdiction.

The English cases touching the power of Parliament having been so fully considered in the *Kilbourn Case*, and in the *Nugent Case*, 18 Fed. Cas. 471, we deem it unnecessary to discuss them or consider whether Congress in

either branch can trace the power back to Parliament. We confine ourselves to what Congress has done and what the courts of this country have decided.

The power was exercised in the cases of Randall (1795) and Duane (1800). Hinds' Precedents, pp. 1047–1052; Story Const., § 848. These were followed by a number of others. Hinds' Precedents, vols. 2 and 3, pp. 1047 *et seq.* It was sustained in *Anderson* v. *Dunn*, 6 Wheat. 204; Hinds' Precedents, pp. 1056 *et seq.;* and the *Nugent Case, supra;* Hinds' Precedents, pp. 1110 *et seq.*

The law as settled by *Anderson* v. *Dunn* was followed by courts and text-writers in this country and remained unquestioned until *Kilbourn* v. *Thompson.* See *Ex parte Dalton*, 44 Ohio St. 142; Story Const., § 847, pp. 614–615; Rawle Const., c. 4, p. 48; Hare's Am. Const. Law, vol. 2, pp. 850–851.

Kilbourn v. *Thompson* is authority only for the proposition that where the matter under investigation is beyond the jurisdiction of the House there is no authority in either House to compel a witness to testify as to the subject under investigation; and the opinion clearly indicates (p. 193) that if it had been an impeachment proceeding Kilbourn could have been punished for contempt for refusing to answer questions propounded to him as a witness before the committee conducting the investigation. The question whether the power exists as one necessary to enable either House to exercise successfully its function of legislation was not decided.

Either House may punish disorderly behavior of its members, compel attendance of witnesses, and the production of papers in election and impeachment cases and in any case that may involve the existence of those bodies. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 485. Refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the Senate constitutes a contempt of that body, and by statute is also

punishable as an offense against the United States. *In re Chapman*, 166 U. S. 661.

If the House through its committee was engaged in a judicial proceeding at the time of the commission of the alleged contempt, then within the reasoning of *Kilbourn* v. *Thompson* it had power and jurisdiction to punish for contempt. The committee was considering charges that appellant had committed impeachable offenses and impeaching him therefor, and was engaged in taking evidence in relation thereto. Impeachments are judicial proceedings. Wilson's Works, vol. 2, p. 45, citing 2 Hale, P. C., p. 150; 4 Black. Com., p. 256; Hare's Am. Const. Law, p. 855; *Kilbourn* v. *Thompson*, *supra*, pp. 190, 191. The House of Representatives and the Judiciary Committee acting for it and as a part of it is as much a portion of the court of impeachment as a grand jury is a part of the court to which it is attached. A publication in relation to the grand jury is punishable as a contempt. *Percival* v. *State*, 50 Am. St. Rep. (note) 575. In matters over which the House has jurisdiction it may subpœna witnesses and punish for contempt for not appearing, or refusing to testify; and the writing and publication of letters attacking the honesty of the motives and integrity of the House is a matter much more likely to discredit Congress and bring it into contempt than merely disobeying its subpœna.

If the power exists at all, it must exist for all kinds of contempts, and once conceded it is not divisible. The courts will not interfere (the House having jurisdiction in the premises) to say that it can punish for one kind of contempt and not for another.

The House has jurisdiction to punish, as an exercise of power necessary to enable it to fully exercise the powers expressly conferred. Congress has power to "make all laws which shall be necessary and proper for carrying into execution" the powers expressly granted by Article I

of the Constitution—legislative powers; but it is the fundamental law that in addition, by implication, in the absence of any express limitations thereon, it possesses those necessary to enable it to discharge the duties and obligations expressly conferred upon it. *United States* v. *Fisher*, 2 Cranch, 358, 396; *McCulloch* v. *Maryland*, 4 Wheat. 316, 413, 421; *Legal Tender Cases*, 12 Wall. 457, 533, 534, 538; *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668, 681.

In the light of the interpretations given to the word "necessary" in the clause of the Constitution above quoted, it can hardly be denied that the power to punish for contempt is a power necessary to enable Congress to perform the functions allotted to it by the Constitution. In exercising legislative functions, or when considering charges of impeachment, its members should be free from assaults upon their integrity or the honesty of their motives; they should be as uninfluenced in their deliberations as should the courts, and to that end they should have the same means of protecting themselves from disturbing influences. The power to punish for contempt is inherent in all courts of justice and legislative bodies. *Yates* v. *Lansing*, 9 Johns. 385, 416; *Anderson* v. *Dunn*, 6 Wheat. 204, 226–228; *In re Chapman*, *supra*, p. 668.

For Congress, or either branch of it, when acting within its jurisdiction, to itself summarily punish those guilty of contempt is to proceed by direction and not by indirection to a legitimate end by means not prohibited by the Constitution (*McCulloch* v. *Maryland*, *supra*, p. 421), and by a method peculiarly appropriate and plainly adapted to its protection.

Mr. Chief Justice White delivered the opinion of the court.

These are the facts: A member of the House of Representatives on the floor charged the appellant, who was the

district attorney of the Southern District of New York, with many acts of misfeasance and nonfeasance. When this was done the grand jury in the Southern District of New York was engaged in investigating alleged illegal conduct of the member in relation to the Sherman Anti-Trust Law and asserted illegal activities of an organization known as Labor's National Peace Council to which the member belonged. The investigation as to the latter subject not having been yet reported upon by the grand jury, that body found an indictment against the member for a violation of the Sherman Law. Subsequently calling attention to his previous charges and stating others, the member requested that the judiciary committee be directed to inquire and report concerning the charges against the appellant in so far as they constituted impeachable offenses. After the adoption of this resolution a subcommittee was appointed which proceeded to New York to take testimony. Friction there arose between the subcommittee and the office of the district attorney based upon the assertion that the subcommittee was seeking to unlawfully penetrate the proceedings of the grand jury relating to the indictment and the investigations in question. In a daily newspaper an article appeared charging that the writer was informed that the subcommittee was endeavoring rather to investigate and frustrate the action of the grand jury than to investigate the conduct of the district attorney. When called upon by the subcommittee to disclose the name of his informant the writer declined to do so and proceedings for contempt of the House were threatened. The district attorney thereupon addressed a letter to the chairman of the subcommittee avowing that he was the informant referred to in the article, averring that the charges were true and repeating them in amplified form in language which was certainly unparliamentary and manifestly ill-tempered and which was well calculated to arouse the indignation not only of the members of the

subcommittee but of those of the House generally. This letter was given to the press so that it might be published contemporaneously with its receipt by the chairman of the subcommittee. The judiciary committee reported the matter to the House and a select committee was appointed to consider the subject. The district attorney was called before that committee and re-asserted the charges made in the letter, averring that they were justified by the circumstances and stating that they would under the same conditions be made again. Thereupon the select committee made a report and stated its conclusions and recommendations to the House as follows:

"We conclude and find that the aforesaid letter written and published by said H. Snowden Marshall to Hon. C. C. Carlin, chairman of the subcommittee of the Judiciary Committee of the House of Representatives, on March 4, 1916 . . . , is as a whole and in several of the separate sentences defamatory and insulting and tends to bring the House into public contempt and ridicule, and that the said H. Snowden Marshall, by writing and publishing the same, is guilty of contempt of the House of Representatives of the United States because of the violation of its privileges, its honor and its dignity."

Upon the adoption of this report under the authority of the House a formal warrant for arrest was issued and its execution by the Sergeant-at-Arms in New York was followed by an application for discharge on *habeas corpus* and the correctness of the judgment of the court below refusing the same is the matter before us on this direct appeal.

Whether the House had power under the Constitution to deal with the conduct of the district attorney in writing the letter as a contempt of its authority and to inflict punishment upon the writer for such contempt as a matter of legislative power, that is, without subjecting him to the

statutory modes of trial provided for criminal offenses protected by the limitations and safeguards which the Constitution imposes as to such subject, is the question which is before us. There is unity between the parties only in one respect, that is, that the existence of constitutional power is the sole matter to be decided. As to all else there is entire discord, every premise of law or authority relied upon by the one side being challenged in some respects by the other. We consider, therefore, that the shortest way to meet and dispose of the issue is to treat the subject as one of first impression, and we proceed to do so.

Undoubtedly what went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions. Certain is it that authority was possessed by the House of Commons in England to punish for contempt directly, that is, without the intervention of courts, and that such power included a variety of acts and many forms of punishment including the right to fix a prolonged term of imprisonment. Indubitable also is it, however, that this power rested upon an assumed blending of legislative and judicial authority possessed by the Parliament when the Lords and Commons were one and continued to operate after the division of the Parliament into two houses either because the interblended power was thought to continue to reside in the Commons, or by the force of routine the mere reminiscence of the commingled powers led to a continued exercise of the wide authority as to contempt formerly existing long after the foundation of judicial-legislative power upon which it rested had ceased to exist. That this exercise of the right of legislative-judicial power to exert the authority stated prevailed in England at the time of the adoption of the Constitution and for some time after has been so often recognized by the decided cases relied upon and by decisions of this court, some of which are in the

margin,[1] as to make it too certain for anything but statement.

Clear also is it, however, that in the state governments prior to the formation of the Constitution the incompatibility of the intermixture of the legislative and judicial power was recognized and the duty of separating the two was felt, as was manifested by provisions contained in some of the state constitutions enacted prior to the adoption of the Constitution of the United States, as illustrated by the following articles in the constitutions of Maryland and Massachusetts.

"That the House of Delgates may punish, by imprisonment, any person who shall be guilty of a contempt in their view, by any disorderly or riotous behavior, or by threats to, or abuse of their members, or by any obstruction to their proceedings. They may also punish, by imprisonment, any person who shall be guilty of a breach of privilege, by arresting on civil process, or by assaulting any of their members, during their sitting, or on their way to, or return from the House of Delegates, or by any assault of, or obstruction to their officers, in the execution of any order or process, or by assaulting or obstructing any witness, or any other person, attending on, or on their way to or from the House, or by rescuing any person committed by the House: and the Senate may exercise the same power, in similar cases." Constitution of Maryland, 1776, Article XII.

"They [the house of representatives] shall have authority to punish by imprisonment every person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in its presence; or who, in the town where the general court is sitting, and during the time of its sitting, shall threaten harm to the

[1] *Brass Crosby's Case*, 3 Wils. 188; *Burdett* v. *Abbot*, 14 East, 1; *Stockdale* v. *Hansard*, 9 Ad. & El. 1; *Anderson* v. *Dunn*, 6 Wheaton, 204; *Kilbourn* v. *Thompson*, 103 U. S. 168.

body or estate of any of its members, for anything said or done in the house; or who shall assault any of them therefor; or who shall assault or arrest any witness, or other person, ordered to attend the house, in his way in going or returning; or who shall rescue any person arrested by the order of the house.

"And no member of the house of representatives shall be arrested, or held to bail on mesne process, during his going unto, returning from, or his attending the general assembly.

"The senate shall have the same powers in the like cases; and the governor and council shall have the same authority to punish in like cases: *Provided,* That no imprisonment, on the warrant or order of the governor, council, senate, or house of representatives, for either of the above-described offences, be for a term exceeding thirty days." Constitution of Massachusetts, 1780, part second, chapter 1, § 3, Articles X and XI.

The similarity of the provisions points to the identity of the evil which they were intended to reach. Clearly they operate to destroy the admixture of judicial and legislative power as prevailing in the House of Commons since the provisions in both the state constitutions and the limitations accompanying them are wholly incompatible with judicial authority. Moreover, as under state constitutions all governmental power not denied is possessed, the provisions were clearly not intended to give legislative power as such, for full legislative power to deal with the enumerated acts as criminal offenses and provide for their punishment accordingly already obtained. The object, therefore, of the provisions could only have been to recognize the right of the legislative power to deal with the particular acts without reference to their violation of the criminal law and their susceptibility of being punished under that law because of the necessity of such a legislative authority to prevent or punish the acts independently

because of the destruction of legislative power which would arise from such acts if such authority was not possessed.

How dominant these views were can be measured by the fact that in various other States almost contemporaneously with the adoption of the Constitution similar provisions were written into their constitutions and continued to be adopted until it is true to say that they became if not universal, certainly largely predominant in the States.[1]

No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal with contempt committed by its own members. Article I, § 5. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people or the States, it follows that no other express authority to deal with contempt can be conceived of. It comes then to this, was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive and judicial authority which is interwoven in the very fabric of the Constitution and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution. This conclusion has long since been

[1] 1790, South Carolina, Article I, § 13; 1792, New Hampshire, Part second, §§ 22 and 23; 1796, Tennessee, Article I, § 11; 1798, Georgia, Article I, § 13; 1802, Ohio, Article I, § 14; 1816, Indiana, Article III, § 14; 1817, Mississippi, Article III, § 20; 1818, Illinois, Article II, § 13; 1820, Maine, Article IV, Part third, § 6; 1820, Missouri, Article III, § 19.

authoritatively settled and is not open to be disputed. *Anderson* v. *Dunn*, 6 Wheat. 204; *Kilbourn* v. *Thompson*, 103 U. S. 168. Whether the right to deal with contempt in the limited way provided in the state constitutions may be implied in Congress as the result of the legislative power granted, must depend upon how far such limited power is ancillary or incidental to the power granted to Congress,—a subject which we shall hereafter approach.

The rule of constitutional interpretation announced in *McCulloch* v. *Maryland*, 4 Wheat. 316, that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it. And as there is nothing in the inherent nature of the power to deal with contempt which causes it to be an exception to such rule, there can be no reason for refusing to apply it to that subject.

Thus in *Anderson* v. *Dunn*, *supra*, which was an action for false imprisonment against the Sergeant-at-Arms of the House for having executed a warrant for arrest issued by that body in a contempt proceeding, after holding as we have already said, that the power possessed by the House of Commons was incompatible with the Constitution and could not be exerted by the House, it was yet explicitly decided that from the power to legislate given by the Constitution to Congress there was to be implied the right of Congress to preserve itself, that is, to deal by way of contempt with direct obstructions to its legislative duties. In *Kilbourn* v. *Thompson*, *supra*, which was also a case of false imprisonment for arrest under a warrant issued by order of the House in a contempt proceeding, although the want of right of the House of Representatives to exert the judicial-legislative power possessed by the House of Commons was expressly reiterated, the question was reserved as to the right to imply an authority in the House of Representatives to deal with contempt as to a

subject-matter within its jurisdiction, the particular case having been decided on the ground that the subject with which the contempt proceedings were concerned was totally beyond the jurisdiction of the House to investigate. But in *In re Chapman*, 166 U. S. 661, the principle of the existence of an implied legislative authority under certain conditions to deal with contempt was again considered and upheld. The case was this: Chapman had refused to testify in a Senate proceeding and was indicted under § 102 of the Revised Statutes making such refusal criminal. He sued out a *habeas corpus* on the ground that the subject of the refusal was exclusively cognizable by the Senate and that therefore the statute was unconstitutional as a wrongful delegation by the Senate of its authority and because to subject him to prosecution under the statute might submit him to double jeopardy, that is, leave him after punishment under the statute to be dealt with by the Senate as for contempt. After demonstrating the want of merit in the argument as to delegation of authority, the proposition was held to be unsound and the contention as to double jeopardy was also adversely disposed of on the ground of the distinction between the implied right to punish for contempt and the authority to provide by statute for punishment for wrongful acts and to prosecute under the same for a failure to testify, the court saying that "the two being *diverso intuito* and capable of standing together," they were susceptible of being separately exercised.

And light is thrown upon the right to imply legislative power to deal directly by way of contempt without criminal prosecution with acts the prevention of which is necessary to preserve legislative authority, by the decision of the Privy Council in *Kielley* v. *Carson*, 4 Moo. P. C. 63, which was fully stated in *Kilbourn* v. *Thompson*, *supra*, but which we again state. The case was this: Kielley was adjudged by the House of Assembly of Newfoundland

guilty of contempt for having reproached a member "in coarse and threatening language" for words spoken in debate in the House. A warrant was issued and Kielley was arrested. When brought before the House he refused to apologize and indulged in further violent language toward the member and was committed. Having been discharged on *habeas corpus* proceedings, he brought an action for false imprisonment against the Speaker and other members of the House. As a justification the defendants pleaded that they had acted under the authority of the House. A demurrer to the plea was overruled and there was a judgment for the defendants. The appeal was twice heard by the Privy Council, the court on the second argument having been composed of the Lord Chancellor (Lyndhurst), Lords Brougham, Denman, Abinger, Cottenham and Campbell, the Vice Chancellor (Shadwell), the Lord Chief Justice of the Common Pleas (Tindal), Mr. Justice Erskine, Lushington and Baron Parke.

The opinion on reversal was written by Parke, B., who said:

"The main question raised by the pleadings, . . . was whether the House of Assembly had the power to arrest and bring before them, with a view to punishment, a person charged by one of its Members with having used insolent language to him out of the doors of the House, in reference to his conduct as a Member of the Assembly—in other words, whether the House had the power, such as is possessed by both Houses of Parliament in England, to adjudicate upon a complaint of contempt or breach of privilege."

After pointing out that the power was not expressly granted to the local legislature by the Crown, it was said the question was "whether by law, the power of committing for a contempt, not in the presence of the Assembly, is incident to every local Legislature."

"The Statute Law on this subject being silent, the

Common Law is to govern it; and what is the Common Law, depends upon principle and precedent.

"Their Lordships see no reason to think, that in the principle of the Common Law, any other powers are given them, than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment, an act which on both sides, it is admitted, it was competent for the Crown to perform. This is the principle which governs all legal incidents." And after quoting the aphorism of the Roman law to the effect that the conferring of a given power carried with it by implication the right to do those things which were necessary to the carrying out of the power given, the opinion proceeded: "In conformity to this principle we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their Legislative functions, they are justified in acting by the principle of the Common Law. But the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local Legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions."

There can be no doubt that the ruling in the case just stated upheld the existence of the implied power to punish for contempt as distinct from legislative authority and yet flowing from it. It thus becomes apparent that from a

doctrinal point of view the English rule concerning legislative bodies generally came to be in exact accord with that which was recognized in *Anderson* v. *Dunn*, *supra*, as belonging to Congress, that is, that in virtue of the grant of legislative authority there would be a power implied to deal with contempt in so far as that authority was necessary to preserve and carry out the legislative authority given. While the doctrine of *Kielley* v. *Carson* was thus in substantive principle the same as that announced in *Anderson* v. *Dunn*, we must not be understood as accepting the application which was made of the rule to the particular case there in question since, as we shall hereafter have occasion to show, we think that the application was not consistent with the rule which the case announced and would, if applied, unwarrantedly limit the implied power of Congress to deal with contempt.

What does this implied power embrace? is thus the question. In answering, it must be borne in mind that the power rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted.

These principles are plainly the result of what was decided in *Anderson* v. *Dunn*, *supra*, since in that case in answering the question what was the rule by which the extent of the implied power of legislative assemblies to deal with contempt was controlled, it was declared to be "*the least possible power adequate to the end proposed*," (6 Wheat. 231), which was but a form of stating that as it resulted from implication and not from legislative will, the legislative will was powerless to extend it further

than implication would justify. The concrete application of the definition and the principle upon which it rests were aptly illustrated in *In re Chapman*, *supra*, where, because of the distinction existing between the two which was drawn, the implied power was decided not to come under the operation of a constitutional limitation applicable to a case resting upon the exercise of substantive legislative power.

Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation, that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed. And the essential nature of the power also makes clear the cogency and application of the two limitations which were expressly pointed out in *Anderson* v. *Dunn*, *supra*, that is, that the power even when applied to subjects which justified its exercise is limited to imprisonment and such imprisonment may not be extended beyond the session of the body in which the contempt occurred. Not only the adjudged cases but congressional action in enacting legislation as well as in exerting the implied power conclusively sustain the views just stated. Take for instance the statute referred to in *In re Chapman* where, not at all interfering with the implied congressional power to deal with the refusal to give testimony in a matter where there was a right to exact it, the substantive power had been exerted to make such refusal a crime, the two being distinct the one from the other. So also when the difference between the judicial and legislative powers are considered and the divergent elements which in the nature of things enter into the determination of

what is self-preservation in the two cases, the same result is established by the statutory provisions dealing with the judicial authority to summarily punish for contempt, that is, without resorting to the modes of trial required by constitutional limitations or otherwise for substantive offenses under the criminal law. Act of March 2, 1831, 4 Stat. 487. The legislative history of the exertion of the implied power to deal with contempt by the Senate or House of Representatives when viewed comprehensively from the beginning points to the distinction upon which the power rests and sustains the limitations inhering in it which we have stated. The principal instances are mentioned in the margin [1] and they all except two or three deal with either physical obstruction of the legislative body in the discharge of its duties, or physical assault upon its members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of members from attending so that their duties might be performed, or finally with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel. In the two or three instances not embraced in the classes we think it plainly appears that for the moment the distinction was overlooked which existed between the legislative power to make criminal every form of act which can constitute a contempt to be pun-

[1] 1795, attempt to bribe members of the House; 1800, publication of criticism of the Senate; 1809, assault on a member of the House; 1818, attempt to bribe a member of the House; 1828, assault on the Secretary to the President in the Capitol; 1832, assault on a member of the House; 1835, assault on a member of the House; 1842, contumacious witness; 1857, contumacious witness; 1858, contumacious witness; 1859, contumacious witness; 1865, assault on a member of the House; 1866, assault on a clerk of a committee of the House; 1870, assault on a member of the House; 1871, contumacious witness; 1874, contumacious witness; 1876, contumacious witness; 1894, contumacious witness; 1913, assault on a member of the House.

ished according to the orderly process of law and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority. And in the debates which ensued when the various cases were under consideration it would seem that the difference between the legislative and the judicial power was also sometimes forgotten, that is to say, the legislative right to exercise discretion was confounded with the want of judicial power to interfere with the legislative discretion when lawfully exerted. But these considerations are accidental and do not change the concrete result manifested by considering the subject from the beginning. Thus we have been able to discover no single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify, the penalty or punishment for the refusal remaining controlled by the general criminal law. So again we have been able to discover no instance, except the two or three above referred to, where acts of physical interference were treated as within the implied power unless they possessed the obstructive or preventive characteristics which we have stated, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration. And this latter statement causes us to say, referring to *Kielley* v. *Carson*, *supra*, that where a particular act because of its interference with the right of self-preservation comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions and therefore without resort to judicial proceedings under the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed

when the authority was exerted, for to so hold would be to admit the authority and at the same time to deny it. On the contrary when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence, that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference.

It remains only to consider whether the acts which were dealt with in the case in hand were of such a character as to bring them within the implied power to deal with contempt, that is, the accessory power possessed to prevent the right to exert the powers given from being obstructed and virtually destroyed. That they were not, would seem to be demonstrated by the fact that the contentions relied upon in the elaborate arguments at bar to sustain the authority were principally rested not upon such assumption, but upon the application and controlling force of the rule governing in the House of Commons. But aside from this, coming to test the question by a consideration of the conclusion upon which the contempt proceedings were based as expressed in the report of the select committee which we have previously quoted and the action of the House of Representatives based on it, there is room only for the conclusion that the contempt was deemed to result from the writing of the letter not because of any obstruction to the performance of legis-

lative duty resulting from the letter or because the preservation of the power of the House to carry out its legislative authority was endangered by its writing, but because of the effect and operation which the irritating and ill-tempered statements made in the letter would produce upon the public mind or because of the sense of indignation which it may be assumed was produced by the letter upon the members of the committee and of the House generally. But to state this situation is to demonstrate that the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject. But these considerations plainly serve to mark the broad boundary line which separates the limited implied power to deal with classes of acts as contempts for self-preservation and the comprehensive legislative power to provide by law for punishment for wrongful acts.

The conclusions which we have stated bring about a concordant operation of all the powers of the legislative and judicial departments of the Government, express or implied, as contemplated by the Constitution. And as this is considered, the reverent thought may not be repressed that the result is due to the wise foresight of the fathers manifested in state constitutions even before the adoption of the Constitution of the United States by which they substituted for the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons a system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted and secure their free exertion and yet at the same time not substantially interfere with the great guarantees and limitations con-

cerning the exertion of the power to criminally punish,—a beneficent result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted.

It is suggested in argument that whatever be the general rule, it is here not applicable because the House was considering and its committee contemplating impeachment proceedings. The argument is irrelevant because we are of opinion that the premise upon which it rests is unfounded. But indulging in the assumption to the contrary we think it is wholly without merit as we see no reason for holding that if the situation suggested be assumed it authorized a disregard of the plain purposes and objects of the Constitution as we have stated them. Besides it must be apparent that the suggestion could not be accepted without the conclusion that under the hypothesis stated the implied power to deal with contempt as ancillary to the legislative power had been transformed into judicial authority and become subject to all the restrictions and limitations imposed by the Constitution upon that authority,—a conclusion which would frustrate and destroy the very purpose which the proposition is advanced to accomplish and would create a worse evil than that which the wisdom of the fathers corrected before the Constitution of the United States was adopted. How can this be escaped, since it is manifest that if the argument were to be sustained those things which, as pointed out in *In re Chapman*, *supra*, were distinct and did not therefore the one frustrate the other—the implied legislative authority to compel the giving of testimony and the right criminally to punish for failure to do so—would become one and the same and the exercise of one would therefore be the exertion of, and the exhausting of the right to resort to, the other. Again, accepting the proposition, by what process of reasoning could the

conclusion be escaped that the right to exert implied authority by way of contempt proceedings in so far as essential to preserve legislative power would become itself an exertion of legislative power and thus at once be subject to the limitations as to modes of trial exacted by the guarantee of the Constitution on that subject. We repeat, out of abundance of precaution, we are called upon to consider not the legislative power of Congress to provide for punishment and prosecution under the criminal laws in the amplest degree for any and every wrongful act, since we are alone called upon to determine the limits and extent of an ancillary and implied authority essential to preserve the fullest legislative power, which would necessarily perish by operation of the Constitution if not confined to the particular ancillary atmosphere from which alone the power arises and upon which its existence depends.

It follows from what we have said that the court below erred in refusing to grant the writ of *habeas corpus* and its action must be and it is, therefore reversed, and the case remanded with directions to discharge the relator from custody.

And it is so ordered.